

SECURED TRANSACTIONS HISTORY: THE FRAUDULENT MYTH

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Legal educators urge beginning law professors to learn the history of their subject.¹ Those teaching Anglo-American secured transactions have a difficult time.² The outstanding feature of that law is the filing in public records required for court enforcement of the nonpossessory secured transaction against third parties. So the desired history concerns the legal treatment of the nonpossessory secured transaction prior to the adoption of the filing requirement and the circumstances producing that adoption. But scholars writing in the twentieth century on the history of American secured transactions law typically have not examined these origins. Instead, their works merely assert an assumption about that historical background.³ And that assumption could not be further from the truth.

These scholars have advanced the view that the chattel mortgage acts legalized an otherwise fraudulent transaction during the first half of the nineteenth century.⁴ The chattel mortgage acts required a public filing for the validity of the nonpossessory secured transaction against third parties. The southern American colonies adopted them in the eighteenth century,⁵ the northern United States adopted them in the 1830s,⁶ and Great Britain adopted one in 1854.⁷

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1. See Douglas J. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 127, 128 (1982).

2. A secured transaction insures that a lender gets repaid. In return for the loan, the lender gets an interest in the borrower's personality. See U.C.C. § 1-201(37). Secured transactions do not include security interests in realty, the subject of mortgages. See *id.* § 9-104(j). Secured transactions differ depending on whether the creditor takes possession of the collateral, a pledge, or the debtor retains possession of the collateral, a nonpossessory secured transaction. See *id.* § 9-102(2).

3. See *infra* notes 9-13 and accompanying text for their comments.

4. See *infra* notes 11-13 and accompanying text for the scholars.

5. In the South, South Carolina in 1698 and North Carolina in 1715 passed permissive chattel mortgage acts, those allowing registration for priority yet recognizing the validity of unrecorded chattel mortgages. See 1715 N.C. Laws, ch. 38, § 11, *reprinted in* THE FIRST LAWS OF THE STATE OF NORTH CAROLINA 25 (John D. Cushing comp., 1984); 1698 S.C. Laws, No. 161, p. 3. Maryland in 1729, Virginia in 1734, Georgia in 1755, and British West Florida in 1770 passed mandatory chattel mortgage acts, requiring filing for validity of chattel mortgages. See 1755 Ga. Laws, n.c., *reprinted in* John D. Cushing, comp., THE FIRST LAWS OF THE STATE OF GEORGIA 44-45, 155 (1981); 1729 Md. Laws, p. 7, 8-9; 1734 Va. Laws, ch. 6, § 4, *reprinted in* 4 THE STATUTES AT LARGE (William Waller Hening, comp., 1819-1823), 397; 1770 W. Fla. Laws, n.c., *reprinted in* Robert R. Rea, comp., THE MINUTES, JOURNALS, AND ACTS OF THE GENERAL ASSEMBLY OF BRITISH WEST FLORIDA 377 (1979). Another southern colony, Delaware, in its fraudulent conveyance statute of 1741 prohibited bills of sale of goods without delivery with respect to creditors. See 1741 Del. Laws, n.c., *reprinted in* THE FIRST LAWS OF THE STATE OF DELAWARE 236 (John D. Cushing, comp., 1981).

6. In the North, Massachusetts, New Hampshire, and Connecticut passed mandatory chattel mortgage statutes in 1832, followed by New York in 1833, Rhode Island in 1834, Vermont in 1838, and Maine in 1839. See 1832 Conn. Laws, ch. 7, p. 377; 1839 Me. Laws, ch. 390, p. 557; 1832 Mass. Laws, ch. 157, p. 460; 1832 N.H. Laws, ch. 80, p. 58; 1833 N.Y. Laws, ch. 279, p. 402; 1834 R.I. Laws, p. 53; 1838 Vt. Laws, ch. 27, p. 17.

Western states in the north followed later with Indiana and Wisconsin Territory (including Minnesota as part of Wisconsin Territory) in 1838, Iowa Territory in 1840, Illinois in 1845, and Michigan and Ohio in 1846. See 1845 Ill. Laws, p. 41; 1838 Ind. Laws, p. 470; 1839 Iowa Terr. Laws, ch. 54, p. 75; Mich. Rev. St. 1846, ch. 81, § 10; 1846 Ohio Laws, p. 61; 1838 Wis. Laws, p. 163. Minnesota incorporated the laws of Wisconsin in 1849. Minnesota Territorial Act, § 12, 9 U.S. Stat. 403, 407 (1849).

7. England passed the Bill of Sale Act in 1854. See 17 & 18 Vict., ch. 36, *reprinted in* 46 GREAT BRITAIN, THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, (1854).

England, unlike the United States, also lacked a recording statute for realty prior to 1875, see 38 & 39 Vict., ch. 87 (1875), except in York and Middlesex Counties after 1704 and 1708, respectively. See 2 & 3 Anne,

According to these scholars, the Anglo-American nonpossessory secured transaction did not exist until the nineteenth century. Their most prominent spokesman, Grant Gilmore,⁸ provided the typical statement:

Until early in the nineteenth century the only security devices which were known in our legal system were the mortgage of real property and the pledge of chattels. Security interest in personal property which remained in the borrower's possession during the loan period were unknown.⁹

Gilmore believed that prior to the nineteenth century courts deemed the nonpossessory secured transaction a fraudulent transaction due to the separation of title and possession:

A transfer of an interest in personal property without delivery of possession was looked on as being in essence a fraudulent conveyance, invalid against creditors and purchasers. This principle, which was common both to sales law and to security law, dates from at least 1601 and the decision in *Twyne's Case* Since the principle maintained itself for over two hundred years—few rules of law enjoy so long a run—we must conclude that it corresponded to the needs of its time.¹⁰

One of Gilmore's students perpetuated this fraudulent conveyance theory in a well-respected casebook.¹¹ Thomas Jackson contended that "common law judges in the first half of the nineteenth century [refused] to enforce security interests in personal property where the debtor remained in possession of the collateral."¹² Other twentieth century American scholars also propounded this myth as truth.¹³ As

ch. 4 (1704), reprinted in 8 GREAT BRITAIN, STATUTES OF THE REALM 253 (London: Dawsons of Pall Mall, 1810-28) [hereinafter STAT. OF REALM] (York Registry Act; required); 7 Anne, ch. 20 (1708), reprinted in 9 STAT. OF REALM 89 (Middlesex Registry Act; required); A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 527 (4th ed. 1958). Instead, English real estate law required physical possession of the deed for subsequent transfers of realty, including mortgages. See, e.g., *Head v. Egerton*, 3 P. Wms. 280, 24 Eng. Rep. 1065 (Ch. 1734) (mortgage of first mortgagee who did not endeavor to obtain title documents from debtor is subsequent to second mortgagee since he was an accessory to inducing the second mortgagee to lend); *Peter v. Russell*, 2 Vern. 726, 23 Eng. Rep. 1076 (Ch. 1716) (mortgage of first mortgagee, induced to lend realty lease documentation to debtor, is subsequent to second mortgagee if first mortgagee knew of debtor's intent to obtain further lending).

8. Grant Gilmore was a law professor at Yale University, respected legal historian, and a draftsman of the article of the Uniform Commercial Code dealing with secured transactions. For Gilmore's expertise in secured transactions, see DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY xxv (1987) (calling Gilmore the chief architect of Article 9). Gilmore wrote two books on legal history: GRANT GILMORE, THE DEATH OF CONTRACT (1974) and GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

9. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24 (1965).

10. *Id.*; see *infra* notes 125-26 and accompanying text for a discussion of *Twyne's Case*, 3 Co. Rep. 806, 76 Eng. Rep. 809, *sub nom.* *Chamberlain v. Twyne*, Moo. K.B. 638, 72 Eng. Rep. 809 (1601).

11. See BAIRD & JACKSON, *supra* note 8, at xxv (student of Gilmore).

12. BAIRD & JACKSON, *supra* note 8, at 8. Jackson also accepted the fraudulent conveyance reasoning and absence of chattel mortgage acts until the nineteenth century. See *id.* at 21, 35; see also Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 178 (1983) (for 400 years, if a creditor desired to enforce a secured transaction, it had to make it possible of discovery by others).

13. See RICHARD E. SPEIDEL, ET AL., SECURED TRANSACTIONS, TEACHING MATERIALS 49 (5th ed. 1993) (the industrial revolution caused the chattel mortgage acts of the 1820s increasing personalty wealth and solving the fraudulent conveyance problem); RAYMOND T. NIMMER & INGRID MICHELSEN HILLINGER, COMMERCIAL

a result these scholars have led generations of American lawyers to believe that Anglo-American law tolerates the fraudulent nonpossessory secured transaction only to accommodate the wealthy and sophisticated at the expense of the poor and unsophisticated.¹⁴

Common sense indicates that Gilmore's fraudulent conveyance theory could not be correct. Businessmen generally do not use, and hence would not develop over the requisite time period, a transaction under which they know no court would enforce their rights against the third parties that matter to secured parties.¹⁵ Such actions would cost their businesses too much.

This article provides a more reasonable explanation for the rise of the nonpossessory secured transaction in Anglo-American jurisdictions and exposes the legal prerequisites to their rise. Not all jurisdictions enforce nonpossessory secured transactions against third parties. The Napoleonic Code of 1804, following ancient Germanic legal traditions, banned them.¹⁶ Latin American countries adopted versions of the Napoleonic Code in the nineteenth century.¹⁷ Many still ban nonpossessory secured transactions.¹⁸ Yet ancient Roman law hinted at a different scenario. Primitive Roman law required human hostages providing slave labor to the secured party.¹⁹ Later Roman law substituted personalty for the hostage allowing its use by the secured party, creating the pledge.²⁰ Use of the personalty similarly generated income to repay the debt. And more recent Roman law permitted debtor use of the personalty to work off the debt, giving rise to the nonpossessory secured transaction.²¹ But ancient Roman law never developed a filing requirement for enforcement against third parties.²²

TRANSACTIONS: SECURED FINANCING, CASES, MATERIALS, PROBLEMS 42 (1992) (industrial revolution resulted in chattel mortgage acts, which legalized otherwise fraudulent conveyance); Douglas Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53, 53-54 (1983) (a secured transaction was a fraudulent conveyance from *Twyne's Case* until development of chattel mortgage acts about 200 hundred years ago); 2 GARRARD GLENN, *FRAUDULENT CONVEYANCE AND PREFERENCES* 849 (rev. ed. 1940) (the chattel mortgage is an impossible device due to the fraudulent conveyance statute, citing a bankruptcy case, *Ryall*); *infra* notes 173-76 and accompanying text for a discussion of *Ryall v. Rolle*, 1 Atk. 165, 26 Eng. Rep. 107, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 27 Eng. Rep. 1074 (Ch. 1750).

14. See, e.g., Alan Schwartz, *Security Interest and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1, 2 (1981).

15. With respect to the debtor, the transaction amounts merely to a contract enforced by the court under the usual contract principles. See, e.g., 13 Eliz. I, ch. 5, § 1 (1571), *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 537 (fraudulent conveyance enforceable between parties).

16. See CODE NAPOLEON art. 2118 (1960) (can mortgage only immovables) & art. 2119 (can not mortgage movables); *infra* note 51 for ancient Germanic law.

17. See KENNETH KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK* 45-46 (1975).

18. See, e.g., DISTRITO FEDERAL, CODIGO CIVIL 498 (art. 2893) (1991) (parties can only mortgage realty and associated personalty).

19. See, e.g., H.F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 162, 313-17 (1952); Roger J. Goebel, *Reconstructing the Roman Law of Real Security*, 36 TUL. L. REV. 29, 32 (1961) (theory that *fiducia* not enforced by courts in early Republican Rome relected in Roman preference for personal security rather than real security); see also *Nehemiah* 5:1-5 (sons and daughters become slaves under pledge).

20. See, e.g., JOLOWICZ, *supra* note 19, at 317-18; Goebel, *supra* note 19, at 32-34 (*pignus* replaced *fiducia*); see also *Genesis* 38:17-20 (pledge of signet, cord, and staff).

21. See, e.g., JOLOWICZ, *supra* note 19, at 319-20; Goebel, *supra* note 19, at 35-36 (*hypoteca* developed in late republican or early empire periods).

22. See, e.g., Boris Kozolchuk, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308 (1970) (recording practices in civil law countries comes from Germany of the Middle Ages, not Roman law). See

Finding a pre-chattel mortgage act court's enforcement of a nonpossessory secured transaction against third parties would disprove Gilmore's fraudulent theory. This article generally limits the search for early examples of the Anglo-American nonpossessory secured transaction to the printed appellate opinions.²³ Those opinions contain no nonpossessory secured transactions until the latter part of the seventeenth century.²⁴ A better source might be the less accessible lower and local court records.²⁵ But the chosen sources dispel Gilmore's fraudulent conveyance myth. These opinions reveal many courts enforcing the nonpossessory secured transaction against third parties prior to the passage of the respective chattel mortgage act.²⁶

The present study differs from the fraudulent theorists' approach by focusing on all the readily findable, reported English opinions involving nonpossessory secured transactions before the nineteenth century, rather than just those susceptible to the fraudulent theorists' interpretation. The opinions reveal four different rules to handle third party challenges to the nonpossessory secured transaction, only one of which is the per se fraud rule hypothesized by Gilmore.²⁷ And it only applied to merchant bankruptcies in England. The present investigation also differs from the eighteenth century judges' efforts by considering primarily only those opinions dealing with the nonpossessory secured transaction. These judges and their American counterparts made no distinction between situations involving nonpossessory sales with intent to create a security interest and nonpossessory sales without that intent. They used the same legal rules in both cases.

This new interpretation accounts for the absence of the nonpossessory secured transaction during the Middle Ages and dates its appearance during the latter part of the seventeenth century. The first section of this article provides the background for the rise of the nonpossessory secured transaction. The earliest pronouncements of the English common law, in the twelfth century, record the Norman use of the ancient Germanic ban of the nonpossessory secured transaction. During the fifteenth century, the two forms developed that would eventually permit the transfer of personalty without delivery under a nonpossessory secured transaction despite the Germanic ban. Although the forms became available before the sixteenth century, parties had no incentive to develop the nonpossessory secured transaction until the security devices then in use became undesirable or ineffective. Those security devices were the pledge, recognized by Gilmore, and the collusive judgment. The allowance of interest after 1571 removed the principle reason for the pledge. The pledge had the capability of generating interest despite the usury ban. The 1677

also *infra* notes 44-45 and accompanying text.

23. This is the method of legal historians before 1950. See Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEG. EDUC. 563, 566 (1984) (pre-1950 legal historians describe the development of legal doctrines internally through appellate opinions, ignoring the socioeconomic context). For an example of this method, see *infra* notes 98-99 and accompanying text (the first realty mortgage with debtor possession; such mortgages uncommon during the English Civil War).

24. See GLENN, *supra* note 13, at 845 (no nonpossessory secured transactions appear in the reported English cases before the eighteenth century).

25. This is the method of the Wisconsin School of legal history after 1950. See Friedman, *supra* note 23, at 565.

26. See *infra* notes 195 & 244 and accompanying text.

27. See *infra* notes 112-96 and accompanying text.

Statute of Frauds destroyed the priority of the collusive judgment, changing its priority from the date of the judgment entered prior to the loan to the delivery of the writ of execution to the sheriff for execution.²⁸

The latter two sections of the article provide evidence directly contradicting the fraudulent conveyance theory, both in England and in America, prior to the adoption of the respective chattel mortgage act. Third parties challenged the priority of the nonpossessory secured transaction under both the fraudulent conveyance and bankruptcy statutes, both in England and in the United States. Yet judges in numerous opinions upheld the nonpossessory secured transaction long before the passage of the respective chattel mortgage act.

This study importantly eliminates Gilmore's implication of the nonpossessory secured transaction as a fraudulent transaction²⁹ and redirects investigation of the origin of the nonpossessory secured transaction and hence its purpose, necessity, and meaning away from the nineteenth century to its true time period, the seventeenth century. The nineteenth century bears only on why certain secured parties desired filings, while other creditors desired to prohibit the nonpossessory secured transaction. These parties would never have developed their positions over the passage of the chattel mortgage acts if they had never experienced any problems from using the nonpossessory secured transaction under prior law. Consequently, the chattel mortgage acts deemed nonpossessory secured transactions fraudulent when challenged by third parties, unless filed, in order to force the filing. Gilmore seized upon this aspect of the chattel mortgage acts, extrapolated this deemed fraudulent provision back in time, and incorrectly concluded that before the chattel mortgage acts, courts viewed the nonpossessory secured transaction as fraudulent.³⁰

I. DEVELOPMENT OF THE NONPOSSESSORY SECURED TRANSACTION

Gilmore correctly ascertained that Anglo-Americans did not use the nonpossessory secured transaction during the early Stuart Period. His interpretative error lay in hypothesizing a fraudulent conveyance objection. The English common

28. Collusive judgments generally include recognizances, statutes merchant, and statutes staple. This article refers to them as collusive judgments because the secured party obtained the judgment prior to the lending with the cooperation of the debtor. See *infra* notes 73-84 and accompanying text.

29. Having ruled out a moral or historical justification for the existence of secured credit, Gilmore's student focussed on an economic justification. See Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); see also Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 843-868 (economic interpretation fails to account for why parties did not pursue certain profit-maximizing strategies for debt collection in England from 1740 to 1840). The problem of this approach, however, is the perception that larger firms generally use unsecured credit, while small firms use secured credit. See, e.g., Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 626, 628-30 (1997) (summarizing the various theories and their drawbacks). The economic justification tends to conclude all lenders should become secured. See, e.g., Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067, 1122 (1989) (the model predicts every loan will be secured, if the costs of creating security interests is less than the cost of alternatives). Literature on the topic is legion. See, e.g., Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 620 (1998); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 862-63 n.23 (1996) (providing numerous citations).

30. See also *Bullock v. Williams*, 33 Mass. 33 (1834) (C.J. Lemuel Shaw: "It appears to have been the intent of this 'chattel mortgage statute' to enable the owners of personal property to make a valid transfer, by way of mortgage or conditional sale, to stand as a security, and of course available against third persons . . .").

law from a much earlier date had not enforced a secured transaction nor a mortgage, if the debtor had possession of the collateral.³¹ This early pronouncement of the English common law followed early Germanic legal tradition rather than Roman law. English fraudulent conveyance law, not yet formulated, had no relation to this rule.³²

A. *The Norman Prohibition*

Only certain courts of the king, primarily the King's Bench and the Court of Common Pleas founded under Henry II and Henry III, used the English common law.³³ The king's courts initially only dealt with matters of importance to the king and involving amounts in controversy above a specified amount.³⁴ Other courts, such as county, borough, and manor courts, ecclesiastical courts, and courts of *pie poudre* at fairs and later staple courts in towns with foreign trade for merchants, dealt with other matters but lacked the ability to seize a defendant's property or person, rights held by the king's courts.³⁵ So a creditor might prefer a suit in a king's court for matters involving recalcitrant debtors. Due to the lack of existing or published records for these other courts, however, historians do not know the rules used by them as well as for the English common law.³⁶ Generally, however, the rules used by these courts did not affect the English common law except when the king's courts would adopt rules from these other courts as a source for the English common law.³⁷ It is unlikely that the king's courts adopted rules for the nonpossessory secured transaction from such courts.³⁸

During its early formative period in the twelfth century, the English common law, as delineated by Glanville, mentioned the same two security devices for personality as used under the much earlier Roman law, applicable in Britain hundreds of years before.³⁹ Roman law recognized at least two types of security arrangements for

31. See *infra* notes 49-53 and accompanying text.

32. See *infra* notes 112-116 and accompanying text (for a description of the statutes). Prevention of frauds was the responsibility of the Chancery, since the common law did not know frauds before the passage of the various statutes concerning fraud. See COLIN RHYS LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY* 220 (1962).

33. See Ralph V. Turner, *The Medieval English Royal Courts: The Problem of Their Origins*, 27 *HISTORIAN* 471, 497 (1964) (the King's Bench and the Court of Common Pleas); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 12, 16-18 (1979).

34. See BAKER, *supra* note 33, at 21 (land disputes and after the Statute of Gloucester of 1278 trespass actions above 40 shillings).

35. See *id.* at 21-22, 25, 27, 110-14; Edward Adler, *Business Jurisprudence*, 28 *HARV. L. REV.* 135, 137-140 (1915) (merchant courts).

36. See Kiralfy, *supra* note 7, at 190-91 (merchant courts and unpublished records).

37. See Kevin M. Teeven, *The Contract Jurisdiction and Procedures of Medieval Courts*, 5 *GLENDALE L. REV.* 35, 41 (1986) (use of assumpsit for contract from Middlesex County Court in fourteenth century); Kiralfy, *supra* note 7, at 208 (Lord Mansfield's incorporation of mercantile law in eighteenth century).

38. The Jewish Exchequer, a special court for enforcing Jewish customs among Jews prior to their expulsion from England in 1290, did recognize mortgages with debtor retention subject to a registration system established by Richard I. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 605-06 (1956); POLLACK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 124 (2d ed. 1911) (speculating that it might have so developed had Edward I not expelled the Jews).

39. Glanville knew Roman law texts, anticipated that his readers had some knowledge of Roman law, and frequently provided the Roman law rules but noted the king's courts took no notice of them. See PLUCKNETT, *supra* note 38, at 298.

personalty, one recognizable as a pledge and the other, as a nonpossessory secured transaction. Under the *pignus* the debtor transferred by agreement possession of an item of personalty to the creditor as security for the debtor's discharge of an obligation by a specified date after which the creditor could sell the item, if agreed, or sue to keep the item to satisfy the claim (the action of *impetratio dominii*), with any balance of the claim over the value of the item going to the debtor, who had a right of redemption.⁴⁰

Under the *hypotheca* the debtor created a charge by agreement against the item of personalty (originally a tenant's goods or an agricultural tenant's crops but later also other personalty) in the creditor without transfer of either ownership or possession until the time of performance of the debtor's obligation had passed with the creditor able to sue the debtor (the action of *interdictum Salvianum*) or a third party (the action of *quasi Serviana*) to which possession of the item had passed.⁴¹ Since possession for the *hypotheca* remained with the debtor, the debtor could place successive charges on the item.⁴² Consequently, Roman law required a debtor to inform successive chargees of those charges and their value prior to making the successive charge or face civil and criminal liability for fraud.⁴³ Roman law did not require recordation for validity but provided that *hypothecas* made before notary publics or before three witnesses had priority over others not so made.⁴⁴ Generally, priority in time confirmed priority in right.⁴⁵

Twelfth century English common law treated these two types of security devices because of trade with western Europe. Some of these jurisdictions recognized these devices.⁴⁶ After the Norman Conquest English policy fostered industry and commerce by inducing foreigners to come to make up perceived deficiencies in English production.⁴⁷ These foreigners would use the familiar techniques.

The gage with delivery of the possession of personalty to the creditor resembled the *pignus*. For this gage the king's courts provided an action to force the debtor to redeem the collateral, thereby paying the creditor.⁴⁸

The gage under which a debtor could receive a loan but need not deliver the personalty subject to the security interest resembled the *hypotheca*.⁴⁹ But, for this gage if the debtor refused to keep the agreement, the creditor might have no effective remedy. The king's courts in the twelfth century refused to enforce such

40. See J.A.C. THOMAS, *THE INSTITUTES OF JUSTINIAN* 205-06 (1975).

41. See *id.* at 206, 284.

42. See MAX RADIN, *HANDBOOK OF ROMAN LAW* 206 (1927) (a not infrequent practice).

43. See *id.* at 207; THOMAS, *supra* note 40, at 206.

44. See 14 *THE CIVIL LAW INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO* 267 (Samuel Parsons Scott, trans., 1973) [hereinafter *THE CIVIL LAW*] (Code of Justinian, bk. VIII, tit. 18, § 11); RADIN, *supra* note 42, at 207.

45. See *CIVIL LAW supra* note 44, at 139-40 (first in time, Digest of Justinian, bk. XX, tit. 4, § 12(10)), at 292-93 (same time equal, Digest of Justinian, bk. XIII, tit. 7, § 20); RADIN, *supra* note 42, at 207.

46. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 349 (1983) (chattel mortgage developed in western Europe during the late eleventh, twelfth, and early thirteenth centuries).

47. See HAZELTINE, *The Gage of Land in Medieval England*, 18 *HARV. L. REV.* 36, 43 (1904).

48. See *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILLE* 122-23 (G.D.G. Hall ed., 1965) (Glanville, bk. X, chs. 7) [hereinafter *TREATISE*].

49. See *id.* at 123 (Glanville, bk. X, ch. 8).

agreements in order to avoid the problem of pronouncing on the rights of several prior and subsequent creditors that might arise when debtors gaged personalty without transfer of possession.⁵⁰ Glanville's rule reflected Germanic law. Germanic law, less commercially oriented than Roman law, banned the nonpossessory secured transaction.⁵¹ The evil the Germans found in the secured transaction dealt with the interference with making a livelihood in an era when debtors devoted most of their personalty to subsistence.⁵² The Normans under Henry II merely followed their Germanic tradition. The creditor, however, still had the availability of other courts, but they lacked the ability to seize the debtor's property or person.⁵³

B. The Development of the Transfer Forms

Before the English common law could accept a nonpossessory secured transaction and for as long as it refused to adopt a Roman law approach, it needed to develop a method for transferring personalty without delivery of possession. During the early formative period, the English common law only recognized transfers of personalty by delivery of possession and permitted their recovery when wrongfully taken under the action of detinue.⁵⁴ Since the pledge involved a delivery of possession, the king's courts would enforce it.⁵⁵ Consequently, the pledge became a standard method in England of taking a security interest in personalty during the Middle Ages.⁵⁶

Exceptions to the requirement of delivery of possession did not develop until the fifteenth century. The first recognized exception dealt with the contract of sale for a chattel without delivering possession. Originally, the purchaser in such a situation could not recover the goods sold under detinue since he never had possession.⁵⁷ But by 1442 the king's court viewed the sales agreement as a grant of the right to possession and so the purchaser in such a situation could recover the goods sold

50. See *id.* at 124 (Glanville, bk. X, ch. 8) (refusing to recognize nonpossessory security interests both in personalty and in realty in order to avoid formulating such a rule).

51. See RUDOLF HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 440-47 (1918). Originally Germanic law even partially banned the pledge, permitting it only on basis of judicial authorization. See also *THE LAWS OF THE SALIAN FRANKS* 114 (tit. 50), 147 (tit. 103), 194 (tit. 29) (Katherine Fischer Drew, trans., 1991) (*pignus* banned except as part of the judgment process for enforcing debts); *THE VISIGOTHIC CODE (FORUM JUDICUM)* 177-80 (Samuel Parsons Scott trans., 1910) (bk. 5, tit. 6, l. 3 & 5) (same); *THE BURGUNDIAN CODE* 36-37 (tit. 19) (same) (Katherine Fischer Drew, trans., 1972); *THE LOMBARD LAWS* 101-03 (arts. 245 to 252) (same) (Katherine Fischer Drew trans., 1973).

52. See, e.g., *THE BURGUNDIAN CODE*, *supra* note 51, at 87 (tit. 105) (prohibition of taking a judicial pledge of oxen, bondservants, horses, or cattle).

53. See *supra* note 35 and accompanying text.

54. See POLLACK & MATTLAND, *supra* note 38, at 173-74 (developed from the action of debt), 179; 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 353-54 (5th ed. 1966) (1942); see also *TREATISE* *supra* note 48, at 128 (Glanville, bk. X, ch. 13: action of debt under Henry II).

55. See POLLACK & MATTLAND, *supra* note 38, at 179 (only known gage during the Middle Ages was the pledge).

56. See *id.* But see. PLUCKNETT, *supra* note 38, at 606-07 (statutory forms of security were more popular than mortgages, which in the Middle Ages required creditor possession of the realty). See *infra* notes 73-84 and accompanying text for a discussion of these statutory security devices.

57. 3 HOLDSWORTH, *supra* note 54, at 355 & n.2 (citing Y.B. 7 Hen. IV. Pasch. pl. 10 (1406) & 50 Ed. III. Trin. pl. 8 (1377)).

under detainee even though he never had actual possession.⁵⁸ This form did not require written documentation.⁵⁹

The second recognized exception dealt with a transfer by deed, a sealed document, without delivery of possession. Originally, the validity of transfers by deed required delivery.⁶⁰ But by 1465 the king's court viewed the covenant under the deed as another grant of the right of possession.⁶¹

In accordance with these two exceptions to the delivery requirement, pre-chattel mortgage act nonpossessory secured transactions generally took the form of a sale subject to conditions defeasance or reconveyance regarding payment of the debt: the conditional bill of sale, the chattel mortgage, or the deed of trust. The difference between conditional bills of sale and chattel mortgages involved redemption and the risk of loss for the collateral. Under the chattel mortgage the debtor retained equitable title for purposes of reacquiring the collateral in equity court, a redemption, for a reasonable period after default.⁶² A conditional bill of sale eliminated this right of redemption; instead, the debtor had a right to repurchase, the conditions of which the debtor had to satisfy or lose the right to repurchase.⁶³ For a conditional bill of sale the risk of loss lay on the secured party, while for a chattel mortgage, on the debtor.⁶⁴ The deed of trust resembled the chattel mortgage except instead of the secured party obtaining title to the collateral a third party, the trustee, received title.⁶⁵ Under all three forms the pre-chattel mortgage act nonpossessory secured transaction constituted a sale. So its priority, if recognized, dated from the date of the sale.⁶⁶

58. See *id.* at 355-56 & n.5 (citing Y.B. 17 Ed. IV. Pasch. pl. 2 (1475), reprinted in C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 252 (1949); 49 Hen. VI Mich. pl. 23 (1471); 37 Hen. VI Mich. pl. 18 (1459), reprinted in FIFOOT, *supra* at 249; 20 Hen. VI Trin. pl. 4 (1442), reprinted in FIFOOT, *supra* at 347; see also Anon., 1 Dyer 30a, 73 Eng. Rep. 65 (C.P. 1537)).

59. See M.P. FURMSTON, CHESHIRE & FIFOOT, LAW OF CONTRACT 9 (10th ed. 1981).

60. See Anon., Jenk. 108, 109, 145 Eng. Rep. 76 (Exch. 1459) (Y.B. 37 Hen. VI 6, pl. 13).

61. See 3 HOLDSWORTH, *supra* note 54, at 357 & n.3 (gift, citing Y.B. 7 Ed. IV. Mich. pl. 21 (1465)); Frederick Pollock, *Gifts of Chattels without Delivery*, 6 LAW Q. REV. 446, 448 (1890).

In the fifteenth century the deed transfer is termed a deed of gift, but grantors could make such gifts for consideration (sales) or blood (a modern gift). See *Twyne's Case*, 3 Co. Rep. 80b, 81a, 76 Eng. Rep. 809, 814 (Star Chamber 1601); see also 3 HOLDSWORTH, *supra* at 358 & n.1 (sale by deed of gift, citing Y.B. 27 Hen. VIII, Trin. pl. 6, p. 16 (1536)).

62. See, e.g., *Roberts v. Cocke*, 22 Va. (1 Rand.) 121, 127 (Ch. 1822); *Robertson v. Campbell*, 6 Va. (2 Call.) 421, 428 (ch. 1800); *Chapman v. Turner*, 5 Va. (1 Call.) 280, 288 (ch. 1798). See also LEONARD JONES, A TREATISE ON THE LAW OF MORTGAGES OF PERSONAL PROPERTY 196 (1881) (a reasonable time for redemption, a remedy provided by the chancery court, not the common law courts). *Roberts*, *Robertson*, and *Chapman* all dealt with pledges since the secured party had possession; however, the court treated the pledge situation as a chattel mortgage.

63. See, e.g., *Roberts*, 22 Va. at 127; *Robertson*, 6 Va. at 424; *Chapman*, 5 Va. at 288.

64. See, e.g., *Roberts*, 22 Va. at 126; *Robertson*, 6 Va. at 422; *Chapman*, 5 Va. at 288.

65. See, e.g., *MBroom v. Rives*, 1 Stew. 72, 73 (Ala. 1827); *Malone v. Hamilton*, 1 Minor 286, 287 (Ala. 1824).

66. Some states developed a lien theory for mortgages, where legal title to the land remained with the debtor. See William F. Walsh, *Development of the Title and Lien Theories of Mortgage*, 9 N.Y.U. L.Q. 280 (1932) (land); William H. Lloyd, *Mortgages--The Genesis of the Lien Theory*, 32 YALE L.J. 233-43 (1923) (land: South Carolina in 1791 by statute and New York in 1809 based on comments of Great Britain's Lord Mansfield in 1778). For the old title rule, see *Rockwell v. Bradley*, 2 Conn. 1 (1816); *Blaney v. Bearce*, 2 Me. 132 (1822); *Brown v. Cram*, 1 N.H. 169 (1818); *Erskine v. Townsend*, 2 Mass. 493 (1807); *Simpson v. Ammons*, 10 Pa. (1 Binn.) 176 (1806). For the new lien rule, see *Huntington v. Smith*, 4 Conn. 236 (1822); *Brown v. Bates*, 55 Me. 520 (1868); *Blanchard v. Colburn*, 16 Mass. 345 (1820); *Glass v. Ellison*, 9 N.H. 69 (1837); *Jackson v. Willard*, 4 Johns. 41 (N.Y. 1809);

But mere formulation of a form, either the conditional bill of sale or a conditional deed (chattel mortgage), did not immediately result in parties using nonpossessory secured transactions. One attempt to locate early examples of such security interests turned up only pledges, one in 1452 and the other in 1597.⁶⁷ Use of these forms as security interests required an incentive.

C. The Statutory Incentive

The incentive for nonpossessory secured transactions with debtor retention of the collateral's possession developed only when the advantages of the alternative security devices in use during the Middle Ages before the development of the form for the nonpossessory secured transaction ceased. Two alternative security devices for personalty, the pledge and the collusive judgment, enabled the Glanville preference toward creditor possession of the collateral. Parties also used these two security devices in the American colonies during the seventeenth century.⁶⁸

First, English law prohibited the taking of interest on loans.⁶⁹ English lawmakers

Rickert v. Maderia, 33 Pa. (1 Rawle) 325 (1829). So the switch occurred predominantly in the 1820s.

In contrast, chattel mortgage law rejected the lien theory to retain the title theory. See Langdon v. Buell, 9 Wend. 80 (N.Y. 1832); JONES, *supra* note 62, at 527. Courts treated the granting of a lien on personalty for security generally as a chattel mortgage. See *id.* at 12-13. Modern secured transaction law rejects the title theory, see, e.g., U.C.C. § 1-207(37), as did Roman law. See *supra* notes 39-45 and accompanying text.

67. See GLENN, *supra* note 13, at 842 (describing a pledge of jewels with all the elements of a chattel mortgage present but with transfer of possession by Richard, Duke of York, father of Edward IV; a pledge of silver plate in Bateman v. Elman, Cro. Eliz. 866, 78 Eng. Rep. 1083 (K.B. 1597)).

There exist several early cases where possession and ownership of goods are separated and ownership rights recognized without delivery, but do not involve security interests. See, e.g., Brand v. Lisle, Yelv. 164, 80 Eng. Rep. 109 (C.P. 1609) (debtor's delivery and bailment of goods to defendant for satisfaction of plaintiff-creditor enforceable by plaintiff-creditor, but reason is contract between plaintiff to forebear delivery for defendant's promise to pay in future); Clark's Case, 2 Leon. 30, 74 Eng. Rep. 333 (Ex. 1590) (debtor's delivery and bailment of goods to bailee for satisfaction of debt to third-party creditor not subject to be set aside by Crown when subsequently the debt is assigned to the Crown). Brand and Clark are cited in Ryall v. Rowles, 1 Ves. Sen. 348, 350, 27 Eng. Rep. 1074, 1075 (Ch. 1750) (argument of bankruptcy assignees), as cases involving an enforceable sale under a sealed document without delivery. See *infra* notes 173-76 and accompanying text.

68. See Burton v. Smith, 38 U.S. (13 Pet.) 464, 480 (Virginia adopted the Second Statute of Westminster); Coombs v. Jordan, 3 Bland Ch. 284, 303 (Md. 1831) (before 1732 parties used recognizances in Maryland); Tessier v. Wyse, 3 Bland Ch. 28, 39 (Md. 1830) (parties used statute merchant and staple in Maryland); Hutcheson v. Grubbs, 80 Va. 251, 254 (1885) (Virginia adopted the Second Statute of Westminster at an early date); Borst v. Nalle, 69 Va. (28 Gratt.) 423, 428 (same); 2 PHILIP BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY 369 (1935) (from York Co., Va., records of 1638 to 1648, merchants required planters to provide security for credit of mortgages recorded in county records and judgments consented to and recorded in the courts prior to the lending). But see Longworth v. Screven, 16 S.C.L. 298 (1834) (statutes staple and merchant never expressly made in force in South Carolina). See *infra* note 79 for the Second Statute of Westminster.

In 1732 British creditors of Americans procured a statute allowing them to execute judgments against American land the same as personalty. See 5 Geo. II, ch. 7 (1732); 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 429 (1884). Although parties could use recognizances to levy against land, recognizances disappeared in Maryland when they lost their priority under the State of Frauds. Moreover, several American colonies permitted execution on land after depleting nonexempt personalty. See Stefan A. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 165 (1957) (Massachusetts in 1647, Connecticut in 1641), & 168 (Pennsylvania in 1688).

South Carolina did not become commercial until the end of the eighteenth century, after passage of the 1677 Statute of Frauds. See *infra* note 86 and accompanying text for the significance of the 1677 Statute of Frauds.

69. See 3 Hen. VII, ch. 6 (1487), reprinted in 2 STAT. OF REALM, *supra* note 7, at 515 (declaring interest agreements void); 15 Edw. III, st. 1, ch. 5 (1341), reprinted in 1 STAT. OF REALM, *supra* at 296 (restatement of Glanville's rule); TREATISE, *supra* note 48, at 84 (Glanville, bk. VII, ch. 16 (1180)) (charger of interest forfeits chattels to king on death); Leges Edw. Confessoris, ch. 37 (1043 & 1066 (charging interest a crime)); GEORGE

based the interest prohibition, consistent with the Medieval practice of borrowing for consumption and not production, on Catholic teaching derived from Aristotle's view that all interest was unlawful because money did not breed money and the literal Biblical prohibition.⁷⁰ With possession the creditor could surreptitiously obtain profits and rents from use of the realty or personalty, circumventing the prohibition.⁷¹ The pledge, however, required knowledge of how, or ability, to use the collateral to produce income to replace the prohibited interest.

This preference and drawback disappeared with the Protestant Reformation and the authorization of interest first between 1545 to 1552 and permanently in 1571.⁷² Lack of that use knowledge or ability and the removal of the interest prohibition would naturally disfavor the pledge after 1571.

Second, English law provided for collusive judgments as a security device. The collusive judgment became the more serious competitor of the nonpossessory secured transaction since it possessed both priority and speedy levy. The collection remedies in the king's courts for creditor's initially involved hazards and delays, such as difficulties getting the debtor into court, meeting the defense of wager of law for the debt action, depending on the appearance of witnesses, losing or marring a deed under seal for the covenant action (which extinguished the action), and limiting levy to the debtor's personalty.⁷³ So in the early thirteenth century, creditors devised debts of record, a collusive judgment, by enrolling their deeds on the king's courts' rolls and obtaining shortly thereafter a writ of execution prior to the lending, obviating proof problems, to overcome some of these hindrances.⁷⁴ This procedure

OSBORNE, HANDBOOK OF THE LAW OF MORTGAGES 10 (1970); William F. Fratcher, *Restraints on Alienation of Equitable Interests in Michigan Property*, 51 MICH. L. REV. 509, 539-41 (1953); 8 HOLDSWORTH, *supra* note 54, at 101-103; POLLACK & MATTLAND, *supra* note 38, at 123.

70. See 8 HOLDSWORTH, *supra* note 54, at 101 (citing Clement V's canon of 1311); 2 THE WORKS OF ARISTOTLE 452 (Robert Maynard Hutchins ed., 1952); Luke 6:35 (lend, expecting nothing in return).

71. See, e.g., *Coggs v. Bernard*, 2 Ld. Raym. 909, 916-17, 92 Eng. Rep. 107, 112 (K.B. 1704) (if the pawn be worse for using, such as cloths or linen, pawnee can not use; but if the pawn not worse for use, such as jewels, earrings, or bracelets, pawnee may use them but is liable if lost); *Mores v. Conham*, Owen 123, 74 Eng. Rep. 94b (C.P. 1609) (pawned goods may be used by pawnee as an owner; pawnee can work horse or ox or take cow's milk, but is subject to action if he misuses pawned goods). See OSBORNE, *supra* note 69, at 10; William F. Fratcher, *supra* note 69, at 439-41; POLLACK & MATTLAND, *supra* note 38, at 123.

72. See 13 Eliz., ch. 8 (1571), *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 542 (a limit of 10 percent per annum interest; to continue for 5 years and then until the next Parliament), *continued by* 27 Eliz., ch. 11 (1585), *reprinted in* 4 STAT. OF REALM, *supra* at 718, *continued by* 29 Eliz., ch. 5 (1587), *reprinted in* 4 STAT. OF REALM, *supra* at 770, *continued by* 31 Eliz., ch. 10 (1589), *reprinted in* 4 STAT. OF REALM, *supra* at 808, *continued by* 35 Eliz., ch. 7 (1593), *reprinted in* 4 STAT. OF REALM, *supra* at 854, *made permanent by* 39 Eliz., ch. 18 (1597), *reprinted in* 4 STAT. OF REALM, *supra* at 917; *see also* 37 Hen. VIII, ch. 9, §§ 3, 4 (1545), *reprinted in* 3 STAT. OF REALM, *supra* at 996 (a limit of 10 percent per annum interest), *repealed by*, 5 & 6 Edw. VI, ch. 20, § 1 (1552), *reprinted in* 4 STAT. OF REALM, *supra* at 155; *see* ROBERT ASHTON, THE CROWN AND THE MONEY MARKET 1603-1640 4 (1960) (after 1571). *But see* Fratcher, *supra* note 69, at 540 (after 1623).

During the seventeenth century Parliament continually lowered the maximum rate. See 13 Anne, ch. 15 (1713), *reprinted in* 11 STAT. OF REALM, *supra* at 928 (a limit of 5 percent per annum interest); 12 Chas. 2, ch. 13 (1660), *reprinted in* 5 STAT. OF REALM, *supra* at 236 (a limit of 6 percent per annum interest); 21 Jas. I, ch. 17, § 2 (1623), *reprinted in* 4 STAT. OF REALM, *supra* at 1223, 1224 (a limit of 8 percent per annum interest), *made permanent by*, 3 Chas. I, ch. 5, § 1 (1627), *reprinted in* 5 STAT. OF REALM, *supra* at 27.

73. See PLUCKNETT, *supra* note 38, at 390-91. Wager of law was a method of fact finding, relying upon usually twelve citizens, eventually hired, who swore the defendant debtor was telling the truth when he denied owing the debt. *See id.* at 115-16. The theory in the Middle Ages was that religious fear of lying would deter false swearing. *See id.*

74. See ANGELA CONYERS, WILTSHIRE EXTENTS FOR DEBTS: EDWARD I-ELIZABETH I 10 (1973) (when the

of course allowed debtor possession of the collateral.⁷⁵ The priority of the interest against personalty dated from the date the creditor obtained an execution writ prior to making the loan.⁷⁶ The creditor would deliver the execution writ to the sheriff for levy much later, only if the debt went unpaid.⁷⁷

After 1500 a conditional sale prior to entry of the collusive judgment would have priority, but it lacked the speedy enforcement by levy upon default enjoyed by the collusive judgment. So a creditor with a choice of creating a collusive judgment or a nonpossessory secured transaction would opt for a collusive judgment.

The collusive judgment received statutory sanction, along with the creditor rights to levy on land and to imprison the debtor to force payment. The Statute of Acton Burnell in 1283 provided for the enrollment of mercantile debts in the principle towns in addition to the king's courts.⁷⁸ The Second Statute of Westminster in 1285

writ was issued soon after the recognizance, no money was actually advanced until judgment had been accorded the creditor; it was in the creditor's interest to specify an early date for repayment to keep the loan as liquid as possible); POLLACK & MAITLAND, *supra* note 38, at 203-04 (as early as 1201); PLUCKNETT, *supra* note 38, at 391-92.

The idea for recording debts may have come from the continent where such a practice was available to tradesmen during Henry III's reign. See Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 7 (1919).

75. See Hazeltine, *supra* note 47, at 43-44, 46-47 (1904) (mortgages with debtor retention developed from the judicial execution statutes *elegit*, merchant, and staple of the thirteenth century, making land available for levy). See *infra* notes 78-84 and accompanying text for a discussion of these judicial execution statutes.

76. See, e.g., *Baskerville v. Brocket*, Cro. Jac. 449, 79 Eng. Rep. 384 (K.B. 1618) (recognizance against personalty binds from date the execution writ is awarded); *Boucher v. Wiseman*, Cro. Eliz. 440, 78 Eng. Rep. 680 (C.P. 1595) (nothing can stop execution against personalty after the date of the writ of execution); *Anon.*, Cro. Eliz. 174, 78 Eng. Rep. 431 (Q.B. 1590) (writ of *fiery facias*, the execution writ against personalty, defeats purchase after its date but before levy). See also BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 420 (1st ed. 1771) (1967) (writ of *extendi facias*, the execution writ for the collusive judgment binds personalty, from its date); 3 SELECT CASES CONCERNING THE LAW MERCHANT A.D. 1251-1779 (Hubert Hall ed., 1932); Francis, *supra* note 29, at 827-29 (1986) (suggesting one to nine year delays). But see ABRAHAM CLARK FREEMAN, A TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES AND OF PROCEEDINGS IN AID AND RESTRAINT THEREOF 296 (1882) (writ of *fiery facias* from its teste, which could be the first day of term long anterior to issuance of the writ and the actual rendition of the judgment); *Daley v. Perry*, 9 Yerg. 442 (Tenn. 1836) (the rule in Tennessee differs from that of common law England); *Johnson v. Ball*, 1 Yerg. 291 (Tenn. 1830) (day of judgment is the day of award for writ of execution).

77. See John Romain Rood, *Attachments, Garnishments, and Executions*, in 10 AMERICAN LAW AND PROCEDURE 416 (James Parker Hall ed., 1915) (the evil was to take out execution as security with no intention of delivering to the sheriff).

78. 11 Edw. I (1283), reprinted in 1 STAT. OF REALM, *supra* note 7, at 53. Originally the towns were London, York, and Bristol, with Salisbury added in 1351. See CONYERS, *supra* note 74, at 1.

Foreign merchants, who operated by selling to local English merchants on credit, desired the same sort of summary procedures, ease of proof and drastic executions available for the enrolled deed, for their transactions without the, for them, costly delay of waiting for the periodic sessions of the king's court. The complaint of the local merchants was that many foreign merchants refused to trade in England because their fellows had suffered great losses by advancing goods on credit and were unable to recover their debts since no speedy execution law existed. These complaining merchants procured passage of the Statute of Acton Burnell. See 2 W.F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 452-54 (1880); Levinthal, *supra* note 74, at 7.

The Statute of Acton Burnell, based on an earlier French system, PLUCKNETT, *supra* note 38, at 392 n.3, provided that a merchant to ensure his debt must bring his debtor before the mayor of London, York, or Bristol or before the mayor and a clerk appointed by the king to acknowledge the debt and day of payment. The clerk would enter the recognizance on a roll and prepare a deed sealed by the debtor along with the king's seal. If the debtor defaulted, the creditor must apply to the mayor, who upon review of the deed and recognizance would cause the goods and devisable burgages (leased borough tenements) of the debtor appraised and sold in the amount of the debt or, if no buyers came forward, would deliver the goods to the merchant. If the debtor had no goods within the

extended the procedure to include levy against land, unavailable for other judgments.⁷⁹ The Statute of Merchants in 1285 enforced statute merchants through debtor's prisons.⁸⁰ The Statute of Staples in 1353 extended the enrollment of mercantile debts to the staple towns.^[81] Creditors could apply all three of these statutory judicial liens to collateral that remained in possession of the debtor.⁸² And

mayor's jurisdiction, the mayor would send the recognizance to the Chancellor for a writ directing the appropriate sheriff to act as the mayor. If the debtor had no goods then he was imprisoned until he or his friends had settled with the creditor for the debt and creditor costs spent sustaining the debtor in jail with bread and water and, if a foreign merchant, cost spent attending to his English stay.

79. See 13 Edw. I, st. 1, ch. 18 (1285), *reprinted in* 1 STAT. OF REALM, *supra* note 7, at 45 (*scire facias*) & 82 (*elegit*), *reprinted in* 1 STAT. OF REALM, *supra* at 93; PLUCKNETT, *supra* note 38, at 392.

The Second Statute of Westminster expanded the property available for levy, making land available to both local and foreign merchants. It authorized the writ of *fieri facias* directing the sheriff to satisfy a judgment by selling the debtors lands and goods and the writ of *elegit* directing the sheriff to satisfy a judgment by delivering to the creditor all the debtor's goods and half the debtor's lands. It also provided that enrolled collusive judgments would not admit of further court action and a writ of execution would issue anytime within a year of record.

80. See 3 Edw. I, st. 3, ch. 1 (1285), *reprinted in* 1 STAT. OF REALM, *supra* note 7, at 98; FINLASON, *supra* note 78, at 454. The Statute of Merchants applied only to merchants. 5 Edw. II, ch. 33 (1311), *reprinted in* 1 STAT. OF REALM, *supra* at 165 (so clarifying the prior statute); Levinthal, *supra* note 74, at 8.

The Statute of Merchants corrected the defects in the Statute of Acton Burnell. To remove too much discretion in sheriffs, see PLUCKNETT, *supra* note 38, at 392, the creditor could take the recognizance before more local officials, namely the mayor of London, a chief warden of a city or other town appointed by the king, or other men chosen when the mayor and chief warden could not perform, and before clerks appointed by the king. To remove delays the statute provided for additional recordings and imprisonment of the debtor as a first resort. Recognizances and sealed writings both had two filings, one with the mayor or chief warden, the other with the clerk. Upon default the mayor had the debtor imprisoned. The debtor within three months was to sell his goods and lands to satisfy the debt, and if the debtor failed, the debtor's goods were delivered to the creditor for sale along with a lease of the debtor's lands until the profits from the land satisfied the debt. See *id.*

81. See 27 Edw. III, st. 2, ch. 9 (1353), *reprinted in* 1 STAT. OF REALM, *supra* note 7, at 337; 11 Hen. VI, ch. 10 (1433), *reprinted in* 2 STAT. OF REALM, *supra* at 285 (requiring a surety made to the Crown to prevent debtor practice of countersuit to escape imprisonment on a staple statute); 23 Hen. VIII, ch. 6 (1532), *reprinted in* 3 STAT. OF REALM, *supra* at 372 (authorizing Staple recognizances before the King's Bench and Court of Common Pleas to eliminate practice of non-merchants using staple statutes); see also FINLASON, *supra* note 78, at 381.

The Statute of Staples provided protection similar to the Statute of Merchants, but for mercantile debts of export merchants at the staple towns, who procured passage of the statute to promote commerce. See Levinthal, *supra* note 74, at 9. The English believed that by confining the export trade to certain towns where foreigners would buy and by prohibiting Englishmen to export singly, they would bring more wealth to England than did English trade singly on the Continent. See FINLASON, *supra* at 134. The staple exports were wool, wool bearing skins, leather, and lead. See *id.* at 135. The staple towns were Newcastle-upon-Tyne, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, Bristol, Kaemerdyn in Wales, and Dublin, Waterford, Cork, and Drogheda in Ireland. See *id.* The Statute of Staples was reduced to recovery for small debts in 1532. See 23 Hen. VIII, ch. 6 (1532), *reprinted in* 3 STAT. OF REALM, *supra* at 372; W.J. JONES, THE FOUNDATIONS OF ENGLISH BANKRUPTCY: STATUTES AND COMMISSIONS IN THE EARLY MODERN PERIOD 15 (1979); see also Audley v. Halsey, Cro. Car. 148, 79 Eng. Rep. 731 (K.B. 1629) (debt secured by statute staple on merchandize).

82. See HAZELTINE, *supra* note 47, at 44. Although some writers refer to the statutory liens when used on personalty as security interests in personalty, see, e.g., *id.*, modern thinkers distinguish between a secured transaction and a judicial lien. See U.C.C. § 9-301.

During the era of collusive judgments, creditors could only levy on property in possession of the debtor at the time of enrollment and not after-acquired property. See CONYERS, *supra* note 74, at 2 (land held on the day of recognizance under Statute of Merchants), 6 (land held on day of judgment under the writ of *elegit*, the writ to seize lands rather than burgages permitted after 1285, not date of recognizance as under Statute of Staples), 12 (land held at time of recognizance, not levy), 13 (land at time of recognizance under Statute of Staples, describing ascertainment problems when levy occurred years later), 14 (presumably same rule for goods). Later, jurists developed a claim that collusive judgments included after-acquired property on the basis of dicta in a 1537 yearbook case. See Colhoun v. Snider, 15 Pa. (6 Binn.) 135, 139-42 (laying out the support for inclusion of after-acquired property and explaining the error of the conclusion); KENT, *supra* note 68, at 436 (describing the English common law rule as including after-acquired property).

in 1362 Parliament made all these merchant securities available for all debts, not just mercantile debts.⁸³ Many classes of society began to use collusive judgments extensively for a variety of different transactions, both commercial and non-commercial.⁸⁴

The use of the collusive judgment as an alternative security device survived until the eighteenth century.⁸⁵ The Statute of Frauds in 1677 destroyed the priority of the collusive judgment.⁸⁶ The Statute of Frauds provided that the priority date for the collusive judgment would become the date of delivery of the writ of execution to the sheriff for execution.⁸⁷ This priority date, effective after 1677, would allow priority for a transfer by a sale, such as by a conditional deed or sale for a

83. See 36 Edw. III, Stat. 1, c.7 (1362), reprinted in 1 STAT. OF REALM, *supra* note 7, at 373; HAZELTINE, *supra* note 47, at 43-44.

84. See CONYERS, *supra* note 74, at 7-8 (merchants constituted only a one-third of all the creditors and slightly less of all debtors, with professional men, churchmen, and knights serving as creditors and with peers and knights as debtors), at 9-11 (trade debts represented only one-fifth of all debts, with family arrangements and guarantees well represented).

85. See HAZELTINE, *supra* note 47, at 30 (statute merchants); Francis, *supra* note 29, at 829 (averaged 250 entries per year in 1640 and only 20 per year by 1740 on the King's Bench's and Common Pleas's rolls).

86. See BLACKSTONE, *supra* note 76, at 160 (describing the Statute of Frauds innovation only with conditional estates created by collusive judgments); *id.* at 420 (describing the Statute of Frauds innovation only with the writ of *extendi facias*, the execution writ for the collusive judgment). But see Francis, *supra* note 29, at 829 (crediting the demise of the collusive judgment to the appearance of warrants of attorney). Warrants of attorney, allowing the creditor to obtain a confessed judgment upon default without the appearance of the debtor, more likely became common shortly after 1677 to mimic the speedy levy of the previously effective collusive judgment. But the warrant of attorney could not mimic the priority of the previously effective collusive judgment. See *infra* note 88 and accompanying text. The king's courts had rules concerning warrants of attorney by 1662. See, e.g., Webb v. Aspinall, 7 Taunt. 701, 129 Eng. Rep. 279 n.a (citing Rules of Court, Hil. Term. 14 & 15 Car. II (1662)). See also BLACKSTONE, *supra* at 397.

87. See 29 Car. II, ch. 3, § 16 (1677), reprinted in 5 STAT. OF REALM, *supra* note 7, at 839, 841.

The middle American states and several southern states adopted versions of this section of the Statute of Frauds. For validity at delivery, see 1788 DEL. LAWS, reprinted in 1 DELAWARE, LAWS OF THE STATE OF DELAWARE FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE EIGHTEENTH DAY OF AUGUST, ONE THOUSAND SEVEN HUNDRED AND NINETY-SEVEN 924, 926 (Samuel & John Adams eds., 1797), ch. 178, § 4; 1799 N.J. Laws, ch. 772, § 4, p. 483; 1787 N.Y. Laws, ch. 56, p. 467, 468; 1772 Pa. Laws, ch. 669, p. 389, 390; 1792 Va. Laws, ch. 5, § 12, p. 13, 16; *Armott v. Nichols*, 1 Harr. & J. 471 (Md. 1804) (quoting 29 Car. II, ch. 3, § 16); see also 1789 S.C. Laws, § 26, p. 20, 24 (decendent debt priority). Maryland in 1720 adopted the General Statutes of England, which would include the 1677 Statute of Frauds. See ELIZABETH GASPARD BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836 96 (1964).

The New England states effectively opted for priority at levy. See CONN. REV. STAT., tit. 2, § 73, p. 35, 55 (1821) (levy within 60 days), confirmed by *Allyn v. Burbank*, 9 Conn. 151 (1882) (overplus to other judgment liens); ME. REV. STAT., ch. 60, § 3, p. 219, 220-21 (1821) (levy within 3 months), confirmed by ME. REV. STAT., ch. 60, § 20 (1821) (overplus to other judgment liens in order of time); 1784 Mass. Laws ch. 33, p. 113 (levy within 3 months), confirmed by 1804 Mass. Laws ch. 83, § 6, p. 591, 595 (overplus to other judgment liens in order of time); N.H. REV. STAT., ch. n.s., p. 79-80 (1792) (form of writ of execution) (next court term, usually 3 months), confirmed by 1822 N.H. Laws, ch. 59, § 7, p. 7, 9 (overplus to other judgments liens in order of time for equity of redemption); *Rogers v. Edmunds*, 6 N.H. 70 (1832) (first delivered if levied promptly); 1779 Verm. Laws, ch. n.s., p. 139 (levy within 60 days), confirmed by 1817 Verm. Laws, ch. 119, p. 102 (priority for personality in hands of the sheriff).

North Carolina and Georgia, in contrast, followed the old common law rule or dated priority even earlier. See 1822 Ga. Laws, p. 55 (binds all property from date of judgment); *Ingles v. Donalson*, 3 N.C. 57 (1798).

Efforts to circumvent the delivery rule by staying the sheriff failed. See, e.g., *Matthew v. Warne*, 11 N.J. Law 295, 305, 312 (1830) (creditors' practice in New Jersey ordered the sheriff to stay execution writ; condemning the practice as fraud and awarding priority to a subsequent execution writ that levied); *Storm v. Woods*, 11 Johns. 110 (N.Y. S. Ct. 1814) (stay order to sheriff waives priority); *Eberle v. Mayer*, 9 Pa. (1 Rawle) 33 (1829) (stay order to sheriff waives priority). So in England priority effectively depended on the date of levy after 1743. See *Bradley v. Wyndham*, 1 Wils. 44, 95 Eng. Rep. 483 (K.B. 1743).

nonpossessory secured transaction, anytime between entry of the collusive judgment at court with issuance of the execution writ and delivery of the writ of execution to the sheriff for execution. When creating a security interest and to enjoy the priority previously accorded the collusive judgment, the creditor now had to use a chattel mortgage or conditional sale. The drawback of this new procedure involved the absence of speedy levy for a recalcitrant debtor, partially overcome if used in conjunction with a warrant of attorney.⁸⁸

Francis North,⁸⁹ a member of the landed aristocracy,⁹⁰ crafted this part of the Statute of Frauds,⁹¹ to protect good faith purchasers, including mortgagees under conditional deeds and sales, from liens they could not know about, namely those arising from back-dating a judgment against realty from the date of judgment to the first day of term, which the common law rule allowed, and from withholding the execution writ against personalty until the debtor's default, if ever, the practice under the collusive judgment. In an era when landed estate-holders needed to sell family treasure, standing timber, and land to payoff debts from extravagant living after 1650,⁹² North could no longer permit these common law rules, designed to prevent fraudulent sales after filing of the lawsuit to defeat execution,⁹³ to interfere with the orderly disposal of estates and valuable personalty.

Because of these two reasons, a need for an interest substitute and the priority of collusive judgments, nonpossessory security interests even in realty did not appear until the early seventeenth century concurrent with the disincentive for the pledge. They did not become common until the late seventeenth century concurrent with the disincentive for the collusive judgment.

88. The northern states authorized warrants of attorney by statute for small debts only as a mechanism to reduce the debtor's litigation costs for collections. *See, e.g.*, CONN. REV. STAT. tit. 21, § 33, p. 146-47 (1821) (required debtor's appearance and available only for debts under \$70); Me. Rev. Laws, ch. 77, p. 270 (1821) (required debtor's appearance and writ of execution within three years of default); 1782 Mass. Laws, ch. 21, p. 170 (Sept. ch. 4) (required debtor's appearance and writ of execution within three years of default); 1808 N.H. Laws, ch. n.s., p. 24 (required debtor's appearance, debt under \$200, and writ of execution with stay); 1798 N.J. Laws, ch. 718, p. 350 (on warrant of attorney for confession); 1801 N.Y. Laws, ch. 32, p. 49 (on warrant of attorney for confession); 1806 Pa. Laws, ch. 122, § 28, p. 348 (on warrant of attorney for confession and writ of execution with stay); 1782 Verm. Laws, ch. n.s., p. 112 (§ 11 of act regulating process in civil actions: required debtor's appearance and available only for debt under 200 pounds). The American creditors obtained quick judgments, then awaited default to obtain the execution writ. *See, e.g.*, *Averill v. Loucka*, 6 Barb. 20 (N.Y. S. Ct. 1849) (warrant of attorney on July 1, 1846, judgment on July 11, 1846, and execution writ two years later on October 19, 1848). Rhode Island used bank process contained in the bank's statutory charter with an immediate execution writ issued upon default, obviating the need for a bank to obtain a judgment to collect on a debt due the bank. *See History of the Rhode Island Bank Process and the Terrible Works of the General Assembly in Connection with It*, in 22 BOOK NOTES CONSISTING OF LITERARY GOSSIP, CRITICISMS OF BOOK AND LOCAL HISTORICAL MATTERS CONNECTED WITH RHODE ISLAND 76-77 (Sidney S. Rider ed., 1905). *See supra* note 86 for warrants of attorney.

89. *See* 4 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 280-337 (1868) (life of Lord Guilford). Francis North (1637-1685) served as Solicitor-General (1671-1673), Attorney-General (1673-1675), Chief Justice of the Common Pleas (1675-1682), and as Lord Chancellor (1682-83), and in 1683 became Baron Guilford.

90. *See id.* at 280 (second son of a Baron), 283 (steward on several family manors), 294 (married the heiress of Earl of Downe).

91. *See* 6 HOLDSWORTH, *supra* note 54, at 384; Crawford D. Hening, *The Original Drafts of the Statute of Frauds (29 Car. II c.3) and Their Authors*, 61 U. PENN. L. REV. 284, 315 (1913).

92. *See* JOHN HABAKKUK, MARRIAGE, DEBT AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP 1650-1950 277 (landed families incurred debt to lead lives of luxury and grandeur), 304-05, 330 (landed families liquidated debt by sale of assets), 361 (landed families rarely sold land except to liquidate debts).

93. *See* Rood, *supra* note 77, at 415 (1994).

Edward Coke, an eminent early seventeenth century English jurist, did not know of the mortgage without creditor possession of the realty.⁹⁴ Coke, one of the most influential reporters of Tudor-Stuart legal opinions, reported in thirteen volumes cases from 1572 to 1616, begun in 1600.⁹⁵ Coke's influence stemmed from his attempt to restate English law, first through his *Reports* and second through his *Institutes*, a four-part treatise commenting on Littleton's *Tenures*, the principle statutes, the criminal law, and the jurisdiction and history of the courts.⁹⁶

Coke's knowledge paralleled commercial practice. During the early Stuart Period, lenders made private loans two ways.⁹⁷ These private bankers lent unsecured on the basis of reputation through discounted purchases of bills of exchange for short-term lending and through penal bonds far in excess of the principle amount for long-term lending. Frequently they also required reputable guarantors on the bills of exchange and bonds. These loans had little value unless the borrower or guarantor possessed substantial wealth. Secondly, these bankers lent secured on the basis of pledges, both of realty and personalty of every conceivable type from jewels to clothing.

Historians of realty law record the earliest mention of a mortgage with debtor possession of the collateralized realty as in 1577⁹⁸ and suggest that the technique did not become established until the Restoration.⁹⁹ These historians offered no explanation for the timing of the origin of the mortgage with debtor possession. They inferred the rise would not have occurred without the much earlier development of the equity of redemption as a remedy in the fifteenth and sixteenth century by the Chancery Court,¹⁰⁰ which made possible the shift in possession.¹⁰¹ They also suggested the collusive judgment statutes conditioned parties to debtor possession.¹⁰² This article makes it clear the nonpossessory security interests in real

94. See R.W. TURNER, *EQUITY OF REDEMPTION: ITS NATURE, HISTORY, AND CONNECTIONS WITH EQUITABLE ESTATES GENERALLY* 89 (William W. Gaunt & Co. 1986) (1931).

95. See PLUCKNETT, *supra* note 38, at 280-81. Edward Coke (1552-1634) served as Attorney-General (1601 to 1606), Chief Justice of the Court of Common Pleas (1606 to 1613), Chief Justice of the King's Bench (1613 to 1616), and after 1621 Parliamentary leader in opposition to the Crown. See *id.*, at 243-44.

96. See *id.* at 282.

97. See ASHTON, *supra* note 72, at 2-9.

98. See *Hales v. Hales*, 1 Ch. Rep. 105, 21 Eng. Rep. 520 (1636) (mortgagor "enjoyed the premises for 60 years last past"); TURNER, *supra* note 94, at 89-91; *Sibson v. Fletcher*, 1 Ch. Rep. 59, 21 Eng. Rep. 507 (1632) (1616 mortgage with mortgagor possession from the making); *Powsley v. Blackman*, Cro. Jac. 659, 79 Eng. Rep. 569 (K.B. 1620) (conditional deed of 1612 with proviso that mortgagee will not interfere with mortgagor's possession; mortgagor is a tenant at will); see also *Stone v. Grubham*, 2 Bulst. 225, 80 Eng. Rep. 1079 (K.B. 1615) (suggesting mortgagee possession is not necessary to enforcement of a mortgage).

99. See PLUCKNETT, *supra* note 38, at 607-08 (possession by the debtor under a mortgage did not become established until the middle of the seventeenth century); TURNER, *supra* note 94, at 89-91 (developed by the end of the sixteenth century, with the first case being *Winnington's Case* in 1598, but most reported cases during the English Civil War still have the mortgagee in possession); see also *Pilkington v. Winnington*, 2 Co. Rep. 59a, 76 Eng. Rep. 551 (K.B. 1598) (conditional deed of 1559, not used for security, upheld); ORLANDO BRIDGMAN, *CONVEYANCES BEING SELECT PRECEDENTS OF DEEDS AND INSTRUMENTS CONCERNING THE MOST CONSIDERABLE ESTATES IN ENGLAND* 298 (3d ed. 1699) (form of vendor's mortgage with provision for mortgagor to yield up possession with defeasance).

100. See KIRALFY, *supra* note 7, at 623 (fifteenth century); 5 HOLDSWORTH, *supra* note 54, at 293 (citing Y.B. 9 Ed. IV. Trin. pl. 34 (1456), claiming it was not a true equity of redemption because the basis of jurisdiction was obscure) & 329 (citing *Sedgwick v. Evan*, Ch. Cas. 167, 21 Eng. Rep. 97 (1583)).

101. See OSBORNE, *supra* note 69, at 10. But see TURNER, *supra* note 94, at 89-91 (vice versa).

102. See *supra* note 75.

estate should not appear until the ending of the interest prohibition in 1571 and not become common until after the Statute of Frauds in 1677, the observed pattern.

Even in the mid-seventeenth century the majority of the reported opinions recorded the creditor in possession of the realty.¹⁰³ Land banks still lent on the basis of the pledge of land in the late seventeenth century.¹⁰⁴ During that era the mortgagor created the security interest by granting title to the mortgagee¹⁰⁵ generally through one of two forms: (1) a grant with a covenant to reconvey upon payment or (2) a grant with a condition of defeasance upon payment.¹⁰⁶

The development of the nonpossessory secured transaction occurred even later, at the end of the seventeenth century.¹⁰⁷ The most popular security device in the early Stuart Period still remained the collusive judgment.¹⁰⁸ Private bankers still lent on the basis of the pledge of goods in the mid-seventeenth century.¹⁰⁹ And merchant lenders frequently neglected to take any security interest or lent on general reputation in order to find business.¹¹⁰ The nonpossessory secured transaction also

103. See TURNER, *supra* note 94, at 89-91 (during the English Civil War); see also *Turner v. Crane*, 2 Ch. Rep. 241, 21 Eng. Rep. 668 (1682) (mortgagee possession); *Hodgkins v. Lutwyck*, 2 Freem. 70, 23 Eng. Rep. 1064 (Ch. 1681) (same); *Anon.*, 2 Freem. 60, 23 Eng. Rep. 1058 (Ch. 1680) (same); *Smith v. Valence*, 1 Ch. Rep. 169, 21 Eng. Rep. 540 (1655) (same); *Isham v. Cole*, 1 Ch. Rep. 127, 21 Eng. Rep. 527 (1639) (1605 mortgage with mortgagee possession); *Porter v. Hubbert*, 2 Ch. Rep. 85, 21 Eng. Rep. 623 (1672) (1636 mortgage with mortgagee possession possibly by reason of default); *Fleming v. Taylor*, 1 Ch. Rep. 249, 21 Eng. Rep. 563 (1664) (1643 mortgage with mortgagee possession possibly by reason of default); *Saunders v. Hard*, 1 Ch. Rep. 184, 21 Eng. Rep. 544 (1660) (1595 mortgage with mortgagee possession possibly by reason of default); *Cornel v. Sykes*, 1 Ch. Rep. 193, 21 Eng. Rep. 547 (1660) (1635 mortgage with mortgagee possession possibly by reason of default). But see *Chapman v. Tanner*, 1 Vern. 267, 23 Eng. Rep. 461 (Ch. 1684) (mortgagor possession); *Anon.*, 2 Ch. Cas. 242, 22 Eng. Rep. 927 (1678) (same); *Righton v. Overton*, 2 Freem. 20, 22 Eng. Rep. 1030 (Ch. 1677) (same); *Bedell v. Bedell*, Rep. Temp. Finch 5, 23 Eng. Rep. 3 (Ch. 1673) (same).

104. See J. KEITH HORSEFIELD, *BRITISH MONETARY EXPERIMENTS 1650-1710* 159 (1983) (1691 land bank based on pledged rents and pledged land).

105. See *Ryall v. Rolle*, 1 Atk. 165, 170, 26 Eng. Rep. 107, 110, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 361, 27 Eng. Rep. 1074, 1082 (Ch. 1750) (mortgagee of personalty is the owner); see also *Ratcliffe v. Davis*, *Yelv.* 178, 80 Eng. Rep. 118 (K.B. 1611) (ownership continues in pledgor for a pledge).

106. See BRIDGMAN, *supra* note 99, at 96 (form of mortgage to be void upon repayment), 226 (form of mortgage with condition of redemption); see also PLUCKNETT, *supra* note 38, at 607.

Another form of mortgage was a grant and a regrant, leaving the debtor in possession. See BRIDGMAN, *supra* at 104 (form of mortgage by demise and redemise).

107. See *Bucknal v. Roiston*, Prec. Ch. 285, 24 Eng. Rep. 136, *sub nom.* *Anon.*, 2 Eq. Cas. Abr. 479, 22 Eng. Rep. 407 (Ch. 1709); *Cole v. Davis*, 1 Ld. Raym. 724, 91 Eng. Rep. 1383 (K.B. 1698); *Meggot v. Mills*, 12 Mod. 159, 88 Eng. Rep. 1234, 1 Ld. Raym. 286, 91 Eng. Rep. 1088 (K.B. 1697); see also *Ryall*, 1 Atk. at 185, 26 Eng. Rep. at 120, 1 Ves. Sen. at 374, 27 Eng. Rep. at 1090 (Ch. 1749) (L.C. Hardwicke in 1750: nonpossessory secured transaction developed long after 1624 Bankruptcy Statute).

For an earlier colonial American instance in 1682, see *infra* note 200 and accompanying text.

Prior to 1697 the practice was to deliver the personalty to the mortgagee. See, e.g., *Newton v. Langham*, 2 Ch. Rep. 108, 21 Eng. Rep. 630 (1675) (1660 mortgage of an interest in the East India Company).

108. See JONES, *supra* note 81, at 9.

109. See R.D. RICHARDS, *THE EARLY HISTORY OF BANKING IN ENGLAND* 31-32 (Edward Backwell, private banker to Charles II, was a big pawnbroker), 99 (1659: bank proposal to lend on pawns of goods and land), 100 (1665: bank proposal to lend on pawns), 101 (1674: bank proposal to lend on security of goods and coin deposited), 103 (1662: bank proposal to lend on plate, jewels, cloth, wool, silk, leather, linen, and metals deposited), 110 (1682: Bank of City of London lent on deposit of merchandise and goods), 172 (1694: Bank of England lent on pawns of coffee, tin, iron, copper, and jewels as security for loans), 210 (1650s: private bankers lent on coin and plate deposited), 233 (1683: foundation of credit is goods received, stored and preserved in bank) (1929).

110. See Richard Grassley, *The Rate of Profit in Seventeenth Century England*, *ENG. HIST. REV.* 721, 742 (1969) (on general credit); JONES, *supra* note 81, at 51 (fail to obtain).

developed with forms similar to mortgages, as grants with a covenant to reconvey or with conditions defeasance.¹¹¹

II. THE FOUR ENGLISH RULES

In eighteenth century England, the newly developed security device, the nonpossessory secured transaction, faced attack from three statutes when challenged by third parties, the 1571 Fraudulent Conveyance Statute and the Bankruptcy Statutes of 1604 and 1624. Decisions rendered under these statutes enunciated four rules, two under fraudulent conveyance law and two under the bankruptcy law. Only one was the per se fraud rule advanced by the fraudulent theorists. It applied only in a bankruptcy proceeding for merchant-debtors. Under the other three rules, English courts often upheld the validity of the nonpossessory secured transaction when challenged by third parties.

A. *The Fraudulent Conveyance Law*

The collusive judgment statutes prompted debtors to develop evasive techniques to avoid the imprisonment permitted by those statutes. Overburdened debtors in the fourteenth and fifteenth centuries frequently transferred all their lands and goods to their friends in trust for use of the grantor through fictitious sales, fled to one of the numerous sanctuaries where the king's courts' power did not govern, lived luxuriously from the income of the property transferred until the creditor accepted payment of a small portion of the debt and released the remainder, then returned, and had back their property.¹¹²

Creditors procured passage of the second series of statutes to deter this debtor relief. In 1377 Parliament passed a statute rendering such collusive land transfers followed by sanctuary flight void and hence liable to execution by creditors.¹¹³ By 1488 debtors instead gave their assets to friends and did not run to sanctuaries but remained.¹¹⁴ So in 1488 Parliament extended this creditor protection to chattels by making all transfers of chattels in trust for use of the grantor, collusive or not, void with respect to strangers prejudiced by such transfer but not between the parties themselves.¹¹⁵ Parliament extended these statutes in 1571 to cover all assignments, whether for value or not, made with the intent to defraud or delay creditors:

For the avoyding and abolysshing . . . Gyftes Grauntes Alienations
Conveyaunces . . . With . . . Intent to delaye hynder or defraude Creditors
. . . Bee yt therefore declared . . . every Gyfte Graunte Alienation Bargayne and
Conveyaunce of Landes . . . Goodes and Catalls . . . made . . . for any Intent or

111. See *Batemen v. Elman*, Cro. Eliz. 866, 78 Eng. Rep. 1083 (Ex. 1597) (pledge of personalty in 1594 with condition defeasance).

112. See Israel Treiman, *Escaping the Creditor in the Middle Ages*, 43 L.Q. REV. 230, 235-36 (1927); FINLASON, *supra* note 78, at 142-43; MELVILLE MADISON BIGELOW, *THE LAW OF FRAUDULENT CONVEYANCES* 11-12 (1911).

113. See 50 Edw. III, ch. 6 (1377), reprinted in 1 STAT. OF REALM, *supra* note 7, at 398.

114. See GLENN, *supra* note 13, at 85 (describing such an act to defeat a writ of fieri facias in 1462; citing 1 Paston's Letters, Everyman's Library, 228-29).

115. See 3 Hen. VII, c.4 (1488), reprinted in 3 STAT. OF REALM, *supra* note 7, at 512 (an Acte agaynst fraudulent deeds of gyft); FINLASON, *supra* note 78, at 193-94; see also *Pauncefoot's Case* (Ex. 1593), reported in *Twyne's Case*, 3 Co. Rep. 80b, 82a, 76 Eng. Rep. 809, 816 (Star Chamber 1601) (fled overseas).

Purpose before declared and expressed, shalbe from henceforth deemed and taken onely as againste that pson . . . to be clearly and utterly voyde frustrate and of none Effecte¹¹⁶

Parliament passed this 1571 Fraudulent Conveyance Statute as a revenue measure.¹¹⁷ The statute prevented those under a threat of forfeiting their personality to the Crown through a bill of attainder from thwarting the forfeiture by conveying the personality to heirs. A conviction under the statute resulted in imprisonment and forfeiture of the property, one-half to the Crown and one-half to the injured creditors.¹¹⁸ But English courts quickly shaped this statute to creditors' needs. Upon the statute's passage, these courts voided fraudulent conveyances because of the statute to allow creditors to levy on the debtor's transferred property without a criminal prosecution.¹¹⁹

1. The Absolute-Conditional Rule

In 1615 Coke delineated the absolute-conditional rule. *Stone v. Grubham*¹²⁰ involved a third-party attack under the Fraudulent Conveyance Statute against a sale of a real estate lease and goods by deed of gift contingent upon the payment of a sum of money. The seller retained possession of the lease and goods. Coke upheld the transaction. If the transaction documents indicate an absolute sale, one without any conditions, but the parties permit seller retention of possession, the court will find the transaction a fraudulent conveyance and will not enforce it against adversely affected third parties. But if the transaction documents indicate a conditional sale, one contingent upon some event, and if the seller's retention of possession is consistent with the conditions, then the court will enforce it against adversely affected third parties.

Coke's formulation of the rule anticipated use of written documentation by the parties.¹²¹ Commercial transactions in the king's courts generally involved written contracts before the eighteenth century.¹²² Under the absolute-conditional rule all opinions prior to the appearance of the rebuttable rule involved written documentation to create the nonpossessory secured transaction.¹²³

116. Fraudulent Conveyance Act of 1571, 13 Eliz. I, ch. 5, § 1 [hereinafter Fraudulent Conveyance Act], reprinted in 4 STAT. OF REALM, *supra* note 7, at 537, reenacted, 14 Eliz. I, ch. 11, § 1 (1572), reprinted in 4 STAT. OF REALM, *supra* at 602, made perpetual, 29 Eliz. I, ch. 5, § 1 (1587), reprinted in 4 STAT. OF REALM, *supra* at 709; see Fraudulent Conveyance Act of 1585, 27 Eliz. I, ch. 4, reprinted in 4 STAT. OF REALM, *supra* at 769 (extending the Fraudulent Conveyance Act of 1571 to purchasers), made perpetual, 39 Eliz. I, ch. 18, § 3 (1588), reprinted in 4 STAT. OF REALM, *supra* at 916. See generally KIRALFY, *supra* note 7, at 550.

117. See 1 GLENN, *supra* note 13, at 86-92 (citing SIR SIMON D'EWES, COMPLETE JOURNAL OF THE VOTES, SPEECHES AND DEBATES, BOTH OF THE HOUSE OF LORDS AND HOUSE OF COMMONS, THROUGH THE REIGN OF QUEEN ELIZABETH OF GLORIOUS MEMORIES (1682, 1693)).

118. See Fraudulent Conveyance Act, § 2, reprinted in 4 STAT. OF REALM, *supra* note 7, at 537, 538.

119. See *Mannock's Case*, 3 Dyer 295a, 73 Eng. Rep. 661 (C.P. 1572) (creditor recovered retained profits from land under a writ of *elegit*).

120. 2 Bulst. 225, 226, 80 Eng. Rep. 1079, 1080, 1 Roll. Rep. 3, 81 Eng. Rep. 285 (K.B. 1615) (probably in defeasance form).

121. See SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 567 (1909) (for absolute-conditional rule must have a document).

122. See FURMSTON, *supra* note 59, at 9.

123. See *Stone v. Grubham*, 2 Bulst. 225, 80 Eng. Rep. 1079, 1 Roll. Rep. 3, 81 Eng. Rep. 285 (K.B. 1615) (deed of gift); see also *Oakover v. Pettus*, Cas. Temp. Finch 270, 23 Eng. Rep. 148 (Ch. 1676) (settlement by deed

Since Coke, a member of the landed aristocracy, developed the absolute-conditional rule, it best suited the needs of the landed aristocracy of the seventeenth century.¹²⁴ The landed aristocrats required formalities to deprive them of their property.

The case advanced by fraudulent theorists for the per se fraud rule anticipated the absolute-conditional rule. In *Twyne's Case*¹²⁵ a creditor owed the lesser sought a judgment to permit the sheriff to seize the debtor's assets, predominately sheep, to satisfy his debt. Twyne, the creditor owed the greater, obtained an absolute deed of gift from the debtor for all the debtor's goods in return for cancellation of the debt due Twyne. The debtor retained possession of the sheep, sold some, sheared some, and marked them with his mark. When the sheriff came to levy on behalf of the judgment creditor, Twyne resisted the sheriff by force since he owned the sheep. The Star Chamber found that Twyne's transaction violated the 1571 Fraudulent Conveyance Statute for several reasons, including the absence of any conditions in the deed of gift authorizing the retained possession. So it convicted Twyne of criminal fraud. Twyne's transaction did not come within the exception for transfers made for valuable consideration and in good faith.¹²⁶ Twyne satisfied the first requirement, but not the second since the documentation did not evidence the arrangement. So Twyne offended, not in obtaining a preference nor leaving the debtor in possession, but in lying about the transaction in the documentation.

The absolute-conditional rule involved both practical and moral principles. The rule limited the jury's role. Under the rule a judge could determine the absoluteness or conditions from the document as a question of law.¹²⁷ A jury only need determine compliance with the conditions. The seventeenth century English courts faced juries without adequate mechanisms of control. Medieval attainr became obsolete,

of trust); *Twyne's Case*, 3 Co. Rep. 80b, 76 Eng. Rep. 809, *sub nom.* *Chamberlain v. Twyne*, Moo. K.B. 638, 72 Eng. Rep. 809 (Star Chamber 1601) (sale by deed of gift).

Subsequent English cases using the absolute-conditional rule for the nonpossessory secured transaction also dealt with written documentation. *See Edwards v. Harben*, 2 Term. Rep. 587, 100 Eng. Rep. 315 (K.B. 1788) (executed bill of sale); *see also Brown v. Heathcote*, 1 Atk. 160, 26 Eng. Rep. 103 (Ch. 1746) (deed of assignment, in bankruptcy); *Bourne v. Dodson*, 1 Atk. 154, 26 Eng. Rep. 100 (Ch. 1740) (indenture of bargain and sale, in bankruptcy).

124. *See JONES, supra* note 81, at 8-9 (Parliament controlled by landed aristocrats, including Lord Coke, who assumed merchants lived in extravagance).

125. 3 Co. Rep. 80b-81b, 76 Eng. Rep. 809, 811-14, *sub nom.* *Chamberlain v. Twyne*, Moo. K.B. 638, 72 Eng. Rep. 809 (Star Chamber 1601); *see infra* notes 127-32 and accompanying text for a discussion of the rationale behind the absolute-conditional rule.

126. *See Fraudulent Conveyance Act*, § 5, *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 537, 538 ("this Act . . . shall not extend to any . . . Interest, in . . . Goodes or Catalis . . . conveyed . . . upon good Consideration & bona fide lawfully conveyed . . .").

127. *See, e.g., Edwards v. Harben*, 2 Term. Rep. 587, 596, 100 Eng. Rep. 315, 321 (K.B. 1788) (jury determination not required if only evidence is absolute sale and debtor possession of collateral); *White v. Hussey*, Prec. Ch. 13, 24 Eng. Rep. 7, 8 (Ch. 1690) (same for mortgage of realty). *See also* ARTHUR BEILBY PEARSON AND HUGH FENWICK, BENJAMIN'S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY (1888) (the absolute-conditional rule is a question of law for the judge). *Compare Ryall v. Rowles*, 1 Ves. Sen. 348, 354, 27 Eng. Rep. 1074, 1078 (Ch. 1750) (mortgagee's attorney's argument that under *Stone* and *Bucknal* debtor's possession under a mortgage is not evidence of fraud), *with id.* at 359, 27 Eng. Rep. at 1081 (Judge Burnet's argument that all the circumstances of the matter is for the jury). *See also Stone v. Grubham*, 2 Bulst. 225, 80 Eng. Rep. 1079, 1 Roll. 3, 81 Eng. Rep. 285 (K.B. 1615) (using the absolute-conditional rule for mortgage of lease and personalty); *Bucknall v. Roiston*, Prec. Ch. 285, 24 Eng. Rep. 136, *sub nom.* *Anon*, 2 Eq. Cas. Abr. 479, 22 Eng. Rep. 407 (same for mortgage of goods, citing 40 trial court instances where fraud found solely from debtor's possession).

motions for new trial for verdicts against the weight of the evidence had yet to develop, and juries still decided from their own knowledge of the parties.¹²⁸ For the issue of fraud by debtor possession, adequate parol evidence rules had yet to develop.¹²⁹ Parties to the lawsuit before the King's Bench or Common Pleas could not testify.¹³⁰ So in a battle between creditors over the debtor's collateral, the only evidence often became a written document or the possibly suborned perjury of the debtor. So the absolute-conditional rule removed the issue of fraud by debtor possession from the jury by requiring written title documents.

Moreover, as long as the documentation faithfully described the true transaction revealed by the parties' actions, it was honest and truthful.¹³¹ So the king's courts would uphold the transaction even against adversely affected third parties. But when the documentation failed to accurately describe the true transaction, the parties committed a sin.¹³²

Although the absolute-conditional rule arose for sales, it applied to nonpossessory secured transactions since they took the form of a sale subject to the condition of defeasance or reconveyance.¹³³ But the earliest reported opinion involving the nonpossessory secured transaction under the absolute-conditional rule did not appear until the eighteenth century and then only in the Chancery. Since the Chancery did not use a jury for fact determination, it continued to use the absolute-conditional rule long after the common law courts abandoned it for the rebuttable rule. In that early eighteenth century opinion, the Chancery upheld the nonpossessory secured transaction under the absolute-conditional rule when challenged by a third party for collateral difficult to deliver.¹³⁴ Consequently, one

128. See 6 HOLDSWORTH, *supra* note 54, at 56.

129. Two centuries later the parol evidence rule barred all but the title document under the absolute-conditional rule. See *Starr v. Knox*, 2 Conn. 215 (1817); *Clark v. Richards*, 1 Conn. 54 (1814).

130. See 6 HOLDSWORTH, *supra* note 54, at 388.

131. The medieval English lawyers allowed actions to speak for the transaction for proof purposes. See Kevin M. Teeven, *Problems of Proof and Early English Contract Law*, 15 CAMBRIAN L. REV. 52, 56 (1984) (completion of performance provided proof of contractual agreement for lawsuit to receive payment in England during Middle Ages).

132. For proscriptions against lies, see *Exodus* 20:16 (shall not bear false witness against your neighbor); *Colossians* 3:9 (do not lie to one another).

133. See *Stone v. Grubham*, 2 Bulst. 225, 226, 80 Eng. Rep. 1079, 1080, 1 Roll. Rep. 3, 81 Eng. Rep. 285 (K.B. 1615) (suggesting the rule's use for pledges). But see *Bethel v. Stanhope*, Cro. Eliz. 810, 78 Eng. Rep. 1037, 1038 (C.P. 1600) (a conditional deed of gift of goods invalid as a fraudulent conveyance when the condition only called for payment of twenty shillings for goods valued at two hundred fifty pounds sterling, made according to the jury to defraud creditors).

134. See *Bucknal v. Roiston*, Prec. Ch. 285, 285-86, 24 Eng. Rep. 136, 136-37, *sub nom.* Anon., 2 Eq. Cas. Abr. 479, 22 Eng. Rep. 407 (Ch. 1709) (upholding against a judgment creditor a bill of sale as security for loan to officer-debtor for his goods and proceeds on board ship about to sail to India for three years with debtor's right to sell the goods and reinvest the proceeds in other goods for resale during the voyage). The *Bucknal* judgment rested not on the difficulty of delivery but the specific wording of the documentation. See *id.* (the ship situation resembles realty situation, which requires physical inspection of the deed, since there was a written document corresponding to a realty deed, namely the conditional bill of sale, which on its very face created an obligation to do as the parties did and defeated any notion of an intent to defraud creditors); see also *Head v. Egerton*, 3 P. Wms. 280, 24 Eng. Rep. 1065 (Ch. 1734) (mortgage of first mortgagee who did not endeavor to obtain title documents from debtor is subsequent to second mortgagee since he was an accessory to inducing the second mortgagee to lend); *Peter v. Russell*, 2 Vern. 726, 23 Eng. Rep. 1076 (Ch. 1716) (mortgage of first mortgagee, induced to lend realty lease documentation to debtor, is subsequent to second mortgagee if first mortgagee knew of debtor's intent to obtain further lending).

For the English at sea exception, see *Atkinson v. Maling*, 2 Term. 462, 100 Eng. Rep. 249 (K.B. 1788)

late eighteenth century opinion described every nonpossessory secured transaction case challenged by the 1571 Fraudulent Conveyance Statute as having followed the absolute-conditional rule.¹³⁵ Moreover, when bankrupt assignees first challenged the nonpossessory secured transaction under the bankruptcy statutes in the mid-eighteenth century, they attacked the absolute-conditional rule.¹³⁶

2. The Rebuttable Rule

The 1677 Statute of Frauds caused the absence of opinions dealing with the absolute-conditional rule for the nonpossessory secured transaction. English courts replaced the absolute-conditional rule with the rebuttable rule due to this statute before the nonpossessory secured transaction replaced the collusive judgment. The 1677 Statute of Frauds declared all sales of goods, which included the nonpossessory secured transaction as a conditional deed or sale, involving more than ten pounds sterling void unless evidenced by actual delivery, delivery of part, earnest money given, or written documentation.¹³⁷ English decisions under this statute eventually approved in addition, symbolic delivery such as delivery to an agent, of a warehouse key, or of part on behalf of the whole.¹³⁸

The northern United States evidenced this development. Pennsylvania and Rhode Island failed to adopt the sale of goods provision of the 1677 Statute of Frauds.¹³⁹ Their courts used the absolute-conditional rule.¹⁴⁰ In contrast Massachusetts, New York, New Hampshire, and New Jersey adopted the sale of goods provision.¹⁴¹

(allowing the arrival exception in bankruptcy); *Lampiere v. Pasley*, 2 Term. 485, 100 Eng. Rep. 262 (K.B. 1788) (describing the arrival requirement); *D'Wolf v. Harris*, 8 F. Cas. 193, 4 Mas. 515 (describing how debtor's possession is consistent with the mortgage) (Mass. C.C.D. 1827) (New York law), *aff'd*, 29 U.S. (4 Pet.) 147 (1830); GEORGE CAINES, AN INQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES, OR LEX MECATORIA AMERICANA 527 (1802).

135. See, e.g., *Edwards v. Harben*, 2 Term. Rep. 587, 595, 100 Eng. Rep. 315, 320 (K.B. 1788) (many cases on the subject of nonpossessory secured transactions and absolute-conditional rule universally followed in all cases).

136. See, e.g., *Ryall v. Rolle*, 1 Atk. 165, 170, 26 Eng. Rep. 107, 110, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 361, 27 Eng. Rep. 1074, 1082 (Ch. 1750) (the 1624 Bankruptcy Statute makes no distinction between absolute and conditional sales).

See *infra* note 172 and accompanying text for Chancery's use of the absolute-conditional rule in bankruptcy.

137. See Statute of Frauds of 1677, 29 Car. II, ch. 3, § 17, reprinted in 5 STAT. OF REALM, *supra* note 7, at 839, 841.

138. See *Chaplin v. Rogers*, 1 East 192, 102 Eng. Rep. 75 (K.B. 1800) (part on behalf of whole); *Cooper v. Easton*, 7 Term. Rep. 14, 101 Eng. Rep. 830 (K.B. 1796) (warehouse key); *Sarle v. Keaves*, 2 Esp. 598, 170 Eng. Rep. 468 (N.C. 1798) (to an agent).

139. See 3 HENRY REED, A TREATISE ON THE LAW OF THE STATUTE OF FRAUDS AND OF OTHER LIKE ENACTMENTS IN FORCE IN THE UNITED STATES OF AMERICA AND IN THE BRITISH EMPIRE 330-31 (1884) (Statutes of Pennsylvania and Rhode Island).

140. See *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (at sea exception to rule, secured party's possession impossible until arrival, so deemed consistent with mortgage). Rhode Island had no reported opinions before adoption of its chattel mortgage act.

141. See 1788 Mass. Laws, ch. 18, p. 712 (ten pounds); 1794 N.J. Laws, ch. 496, p. 942, 947 (\$30); 1792 N.H. Rev. Laws, ch. n.s., p. 241 (1791) (ten pounds); 1787 N.Y. Laws, ch. 44, p. 438, 442 (ten pounds); George Caines, *supra* note 134, at 376; see also 1693 Mass. Laws, ch. 15, reprinted in 1 MASSACHUSETTS GENERAL COURT, THE ACTS AND RESOLVES, PUBLIC AND PRIVATE OF THE PROVINCE PAST BY MASSACHUSETTS BAY 47 (1869), 1719 N.H. Laws, ch. 2, reprinted in 2 LAWS OF NEW HAMPSHIRE 328 (Albert Stillman Batchelor ed., 1904).

Their courts used the rebuttable rule.¹⁴² Connecticut and Vermont adopted the sale of goods provision after their written reports commenced.¹⁴³ Their courts used the absolute-conditional rule before the adoption and the heightened rebuttable rule after the adoption.¹⁴⁴

The southern states with permissive filing of chattel mortgages, South Carolina and North Carolina, reflect the same bifurcation. Courts in North Carolina, without the sale of goods provision used the absolute-conditional rule. Courts in South Carolina, with the sale of goods provision, used the rebuttable rule.¹⁴⁵

C.J. North drafted the sections of the Statute of Frauds dealing with written sale of goods contracts as well as those treating delayed executions.¹⁴⁶ North drafted the sale of goods provision to prevent the landed aristocrats from being deprived of their land and valuable personalty (valued over ten pounds sterling) by oral, possibly perjured testimony in era when the courts had only begun the development of devices to control juries, such as the parol evidence rule and the motions for new trial for a verdict against the weight of the evidence.¹⁴⁷ North also favored and drafted several proposals for a realty recording statute, all of which failed.¹⁴⁸

The newly emerging merchant aristocracy,¹⁴⁹ however, managed to craft the rebuttable rule from the 1677 Statute of Frauds by 1690 for their needs. Although the earliest pronouncement of the rebuttable rule appeared in the Chancery,¹⁵⁰ John

142. See, e.g., *Hussey v. Thornton*, 4 Mass. 404 (1808); *Haven v. Low*, 2 N.H. 13 (1819); *Hendricks v. Mount*, 5 N.J. Law 850 (1820); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. S. Ct. 1810).

143. See 1821 Conn. Laws, ch. 39, p. 246 (\$35); 1823 Verm. Laws, ch. 4, p. 11 (\$40); see also 13 JAMES HAMMOND TRUMBULL, PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 422 (1850) (Connecticut adopted a Statute of Frauds in 1771 for certain transactions to be in writing, but omitted the sale of goods as one).

144. Compare *Clark v. Richards*, 1 Conn. 54 (1814) (absolute-conditional rule); *Fletcher v. Howard*, 2 Verm. 115 (1826) (absolute-conditional rule for pre-1823 case), with *Patten v. Smith*, 5 Conn. 196 (1824) (heightened rebuttable rule); *Tobias v. Francis*, 3 Verm. 423 (1830) (heightened rebuttable rule). See *infra* note 238 for the heightened rebuttable rule.

145. See *Gregory v. Perkins*, 15 N.C. 50 (1830) (absolute-conditional rule); *Gaither v. Mumford*, 4 N.C. 600 (1817) (same); *Ingles v. Donaldson*, 3 N.C. 57 (1798) (same); *Bailey v. Jennings*, 17 S.C.L. 563 (1830) (rebuttable rule); *Dupree v. Harrington*, 5 S.C. Eq. (1824) (same); *DeBardleben v. Beekman*, 1 S.C. Eq. 345 (1793) (same); see *supra* note 5, for the permissive chattel mortgage acts.

North Carolina did not adopt the sale of goods provision of the Statute of Frauds. See 1819 N.C. Laws, ch. 29, p. 50 (written contracts only required for land and slaves); 3 Henry Reed, *supra* note 139, at 324-25 (statute of North Carolina). South Carolina adopted the sale of goods provision in 1712. See *Gadsden v. Lance*, 16 S.C. Eq. 87 (1841).

146. See 6 HOLDSWORTH, *supra* note 54, at 388 & 389 n.3

147. See *id.* (in a trial, C.J. North discovered a party had altered the date in a contract for sale of goods only when the other party, who could not testify under the rules, blurted the truth out in open court, causing North to examine the document by holding it to the light, thus discovering the fraud). But see John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1068, 1183 (1996) (jurisdictional competition between King's Bench and Common Pleas resulted in significant expansion of cases subject to jury trial under the writ of assumpsit in seventeenth century in both courts, so the judges in both courts procured enactment of the Statute of Frauds to reimpose writing requirements for serious transactions); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 604, 610 (1975) (same); Kevin M. Teevin, *A History of Legislative Reform of the Common Law of Contracts*, 26 U. TOL. L. REV. 35, 54-56 (1994) (same, except proponent is Parliament, not judges).

148. See 6 HOLDSWORTH, *supra* note 54, at 582.

149. The mercantile aristocracy came to power with the Whigs in the 1688 Glorious Revolution. In permanent control of Parliament the commercially-minded Whigs set national policy to encourage mercantile expansion without overtly changing the revered common law. See Teevin, *supra* note 147, at 58.

150. See *Hungerford v. Earle*, 2 Vern. 262, 23 Eng. Rep. 768 (Ch. 1691) (assignment for benefit of creditors where trustees left possession with the debtor, contrary to the deed, sent to jury trial); see also *White v. Hussey*,

Holt developed the rebuttable rule and became the first to apply it to the nonpossessory secured transaction.¹⁵¹ The two chancery opinions reflect Holt's innovation of jury trial for the issue of continued possession by the settlor, seller, and debtor. Chancery had to send the case to another court for jury trial since it did not use juries to determine facts.¹⁵² Holt readily decided cases by mercantile custom instead of the strict common law rules, frequently consulted with merchants on pending commercial legal matters, and used his influence with Parliament to obtain passage of an act allowing promissory notes to become negotiable.¹⁵³

North intended the sale of goods provision to provide tangible evidence of the agreement. But it still permitted oral conditional sales contracts in the specified circumstances of part delivery, earnest money deposits, or symbolic delivery and for sales under ten pounds sterling. The rebuttable rule presumed debtor possession as fraudulent. The secured party could rebut the presumption by showing a nonpossessory secured transaction and allow the jury to determine its validity. Merchants in the seventeenth century generally extended credit with informal documentation.¹⁵⁴ Consequently, their title document might be in absolute form, fatal under the absolute-conditional rule, and require supplementation to demonstrate the defeasance condition in light of debtor possession. The rebuttable rule allowed this additional evidence to affect the outcome.¹⁵⁵ It eventually allowed oral security agreements.¹⁵⁶

The earliest reported opinions involving the nonpossessory secured transaction under the rebuttable rule appeared in the late seventeenth century. These two

Prec. Ch. 7, 24 Eng. Rep. 7 (1690) (commissioner refusing to send issue of continued possession under family settlement to jury trial).

151. See *Cole v. Davies*, 1 Ld. Raym. 724, 91 Eng. Rep. 1383 (K.B. 1698) (conditional levy sale without documentation determined valid by jury before Holt); *Meggot v. Mills*, 1 Ld. Raym. 286, 91 Eng. Rep. 1088 (K.B. 1697) (nonpossessory security interest documented by absolute bill of sale found valid by jury before Holt); *Winchelsea v. Maidstone*, 4 Mod. 51, 87 Eng. Rep. 257 (K.B. 1691) (family settlement with continued possession and insufficient explanation found invalid by jury before Holt); see also *Cole v. White*, 26 Wend. 508 (N.Y. 1841) (Sen. Verplanck crediting Holt with devising the rebuttable or prima facie rule).

John Holt (1642-1710) formulated the defense of the Whig's Glorious Revolution in terms of constitutional law and served as Chief Justice of the King's Bench (1689-1710). See PLUCKNETT, *supra* note 38, at 245-46.

152. See 6 HOLDSWORTH, *supra* note 54, at 393.

153. See *Muetford v. Waltot*, 1 Ld. Raym. 574, 91 Eng. Rep. (K.B. 1700) (to decide whether a bill could be accepted after it was due, Holt invited eminent London merchants to discuss the matter with him); PLUCKNETT, *supra* note 38, at 246-47.

154. See 6 HOLDSWORTH, *supra* note 54, 57.

155. For oral agreements supplementing title documents under the rebuttable rule, see *Patten v. Smith*, 5 Conn. 196 (1824); *Ripley v. Dolbeir*, 18 Me. 382 (1841); *Flanders v. Barstow*, 18 Me. 357 (1841); *Smith v. Tilton*, 10 Me. 350 (1831); *Gleason v. Drew*, 9 Me. 79 (1832); *Ulmer v. Hills*, 8 Me. 326 (1832); *Holbrook v. Baker*, 5 Me. 309 (1826); *Reed v. Jewett*, 5 Me. 96 (1827); *Fletcher v. Willard*, 31 Mass. 464 (1833); *Shumway v. Rutter*, 24 Mass. 56 (1828); *Witwell v. Vincent*, 21 Mass. 452 (1825); *Peters v. Ballister*, 20 Mass. 475 (1825); *Lanfear v. Sumner*, 17 Mass. 110 (1821); *Northeast Marine Ins. Co. v. Chandler*, 16 Mass. 274 (1820); *Jewett v. Warren*, 12 Mass. 300 (1815); *Hussey v. Thornton*, 4 Mass. 404 (1808); *Ash v. Savage*, 5 N.H. 545 (1831); *Hendricks v. Mount*, 5 N.J. Law 850 (1820); *Randal v. Cook*, 17 Wend. 54 (N.Y. S. Ct. 1837); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. S. Ct. 1832); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. S. Ct. 1829); *Birkbeck v. Tucker*, 2 Hall 121 (N.Y. Sup. Ct. 1829); *Ackley v. Finch*, 7 Cow. 289 (N.Y. S. Ct. 1827); *M'Intyre v. Scott*, 8 Johns. 160 (N.Y. S. Ct. 1811); *Spaulding v. Austin*, 2 Verm. 555 (1829).

156. For oral security agreements under the rebuttable rule, see *Summer v. Hamlet*, 29 Mass. 76 (1831) (agreement); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. S. Ct. 1832) (declaration); *Thorn v. Hicks*, 7 Cow. 289 (N.Y. S. Ct. 1827) (sale); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (agreement).

opinions did not mention the absolute-conditional rule. The King's Bench upheld the nonpossessory secured transaction when challenged by a third party for the purchase-money security interest and the levy-purchase security interest.¹⁵⁷ Their conditions did not appear in the written documentation but occurred orally.

Courts did not routinely use the rebuttable rule for nonpossessory secured transactions until the early nineteenth century.¹⁵⁸ Since this rule did not come into general use until the early nineteenth century, three hundred years after the absolute-conditional rule, some later commentators referred to the rebuttable rule as the modern English rule.¹⁵⁹

B. The Bankruptcy Statutes

Bankruptcy law provided additional evidence that English courts applied the absolute-conditional rule to the nonpossessory secured transaction. During the Tudor-Stuart Period, before the nonpossessory secured transaction developed, Parliament passed four Bankruptcy Statutes, one each in 1543, 1571, 1604, and 1624.¹⁶⁰

Parliament, controlled predominately by the landed aristocrats, devised these

157. For the purchase money exception, see *Meggot v. Mills*, 12 Mod. 159, 88 Eng. Rep. 1234, 1 Ld. Raym. 286, 91 Eng. Rep. 1088 (K.B. 1697) (upholding absolute bill of sale for household furnishings to secure landlord's loan to buy those goods with the debtor-tenant in possession of the furniture against tenant's supplier of ale). The transaction, however, might have involved a court implied lien. See *Ryall v. Rolle*, 1 Atk. 169, 26 Eng. Rep. 107, 109-110 (Ch. 1750) (*Meggot* not decided on the basis of the absolute-conditional rule, but just decided that for landlords the transaction is not fraudulent); see also *Wiseman v. Vandeputt*, 1 Eq. Cas. 56, 21 Eng. Rep. 870, 2 Vern. 203, 23 Eng. Rep. 461 (Ch. 1690) (in bankruptcy, Chancellor implied security interest for purchase-money obligation for goods on ship that had not sailed yet to defeat general creditor).

For the levy purchase exception, see *Cole v. Davis*, 1 Ld. Raym. 724, 91 Eng. Rep. 1383 (K.B. 1698) (upholding prebankruptcy levy execution against bankruptcy commission where purchaser permitted the debtor to retain possession of the goods upon condition of paying off the debt as the debtor raised it from selling the goods). The transaction, however, might have involved a court implied lien. See *id.* (lacks reference to a security intention). But see *Rice v. Serjeant*, 7 Mod. 37, 87 Eng. Rep. 1078 (K.B. 1702) (fraudulent levy when levying creditor stops sheriff as he seizes the goods and allows the debtor to retain them).

158. See, e.g., *Martindale v. Booth*, 3 B. & Ald. 418, 100 Eng. Rep. (K.B. 1832) (possession is only evidence of fraud, leave it to jury); *Jezeph v. Ingram*, 8 Taunt. 838, 129 Eng. Rep. 609 (C.P. 1817) (want of possession is not in all cases a mark of fraud); *Benton v. Thornhill*, 7 Taunt. 150, 129 Eng. Rep. 60 (C.P. 1816) (jury to decide whether possession was honest); *Steel v. Brown*, 1 Taunt. 381, 127 Eng. Rep. 881 (C.P. 1808) (rejects absolute conditional rule); *Kidd v. Rawlinson*, 2 Bos. & Pull. 59, 126 Eng. Rep. 1155 (K.B. 1800). See also *Eastwood v. Brown, Ry. & Mood*, 312, 171 Eng. Rep. 1032 (N.P. 1825) (sale, possession is not conclusive badge of fraud, leave it to jury); *Stewart v. Lombe*, 1 Brod. & B. 511, 128 Eng. Rep. 818 (C.P. 1820) (mortgage, want of possession is not in all cases a mark of fraud); *Dewey v. Boynton*, 6 East. 257, 102 Eng. Rep. 1285 (K.B. 1805) (family settlement, facts must be presented to jury); *Arundel v. Phipps*, 10 Ves. Jr. 139, 32 Eng. Rep. 797 (Ch. 1804) (family settlement, possession only prima facie evidence of fraud); *Cadogen v. Kennet*, 2 Cowp. 443, 98 Eng. Rep. 1171 (K.B. 1776) (marriage settlement, debtor possession is evidence of fraud); *Martin v. Podger*, 5 Burr. 2631, 98 Eng. Rep. 384, 2 Wm. Black. 701, 96 Eng. Rep. 412 (K.B. 1770) (sale, want of possession ought to be left to jury).

159. See *Watson v. Williams*, 4 Blackf. 26, 29 (Ind. 1835).

160. See Bankruptcy Act of 1624, 21 Jas. I, ch. 19 [hereinafter 1624 Bankruptcy Act], reprinted in 4 STAT. OF REALM, *supra* note 7, at 1227; Bankruptcy Act of 1604, 1 Jas. I, ch. 15 [hereinafter 1604 Bankruptcy Act], reprinted in 4 STAT. OF REALM, *supra* at 1031; Bankruptcy Act of 1571, 13 Eliz. I, ch. 7 [hereinafter 1571 Bankruptcy Act], reprinted in 4 STAT. OF REALM, *supra* at 539; Bankruptcy Act of 1543, 34 & 35 Hen. VIII, ch. 4 [hereinafter 1543 Bankruptcy Act], reprinted in 3 STAT. OF REALM, *supra* at 899; see JONES, *supra* note 81, at 8 (four before the Bankruptcy Act of 1705, 4 Anne, ch. 17, § 8, reprinted in 8 STAT. OF REALM, *supra* at 461, 463, that first provided for debtor discharge).

statutes to apply only to commercial bankrupts.¹⁶¹ These landed aristocrats assumed merchants lived in extravagance, which caused their bankruptcy rather than declining economies, unavailability of cash liquidity, unwise overextensions of credit, or other unsound business practices. So the Bankruptcy Statutes limited bankrupts to merchants and treated them harshly.¹⁶²

The Bankruptcy Statutes did not apply until the merchant-debtor committed an act of bankruptcy, originally flight to a sanctuary. Later expansions of the acts of bankruptcy included leaving the country, keeping to one's house, arrestment for debt, outlawry, and departing one's house with the intent to defraud creditors, added by the 1571 Bankruptcy Statute, procuring fraudulent attachment of one's property and committing a fraudulent conveyance of land or goods, added by the 1604 Bankruptcy Statute, and procuring a composition where a creditor takes less than the full amount, added by the 1624 Bankruptcy Statute.¹⁶³

Bankruptcy proceedings commenced when a creditor applied to specified high royal officials, and after the 1571 Bankruptcy Statute only to the Chancellor.¹⁶⁴ Bankruptcies rarely occurred before the Restoration since merchant-debtors avoided committing an act of bankruptcy and creditors, who must initiate the proceeding, saw no value in ratable distributions required by bankruptcy when further extensions or compositions might yield a larger recovery.¹⁶⁵

These bankruptcy statutes primarily sequestered the bankrupt's assets for ratable distribution to creditors.¹⁶⁶ Creditors who might seek full repayment at the expense of other creditors required restraints.¹⁶⁷ The 1543 Bankruptcy Statute only

161. See JONES, *supra* note 81 at 8-9. Non-merchants could not become bankrupts until 1861. See 15 HOLDSWORTH, *supra* note 54, at 98 (citing 24 & 25 Vict. ch. 1324, §§ 70-75).

162. See EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING THE JURISDICTION OF THE COURTS* 277 (1797) (William S. Hein Co., 1986), ("the English merchant had rioted in three kinds of costliness, viz., costly building, costly diet, and costly apparel, accompanied with neglect of his trade and servants, and thereby consumed his wealth."); see JONES, *supra* note 81, at 52-53.

163. See 1543 Bankruptcy Act, § 1, *reprinted in* 3 STAT. OF REALM, *supra* note 7, at 899-900; 1624 Bankruptcy Act, § 2, *reprinted in* 4 STAT. OF REALM, *supra* at 1227; 1604 Bankruptcy Act, § 1, *reprinted in* 4 STAT. OF REALM, *supra* at 1031; 1571 Bankruptcy Act, § 1, *reprinted in* 4 STAT. OF REALM, *supra* at 539; JONES, *supra* note 81, at 16, 24.

The 1571 Bankruptcy Statute rather than make a fraudulent conveyance an act of bankruptcy punished those creditors who fraudulently acquired the debtor's assets before or after the act of bankruptcy. See 1571 Bankruptcy Act, § 6, *reprinted in* 4 STAT. OF REALM, *supra* at 539, 540.

164. See 1604 Bankruptcy Act, § 2, *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 1031 (refers to 1571 statute); 1571 Bankruptcy Act, § 2, *reprinted in* 4 STAT. OF REALM, *supra* at 539; 1543 Bankruptcy Act, § 1, *reprinted in* 3 STAT. OF REALM, *supra* at 899.

165. See JONES, *supra* note 81, at 10, 35.

166. See 1624 Bankruptcy Act, § 8, *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 1227, 1228 (even if creditor has judgment, statute, recognizance, specialty, attachment, or other security not yet levied or reduced to possession); 1604 Bankruptcy Act, § 2, *reprinted in* 4 STAT. OF REALM, *supra* at 1031 (refers to 1571 statute); 1571 Bankruptcy Act, § 2, *reprinted in* 4 STAT. OF REALM, *supra* at 539; 1543 Bankruptcy Act, § 1, *reprinted in* 3 STAT. OF REALM, *supra* at 899.

167. For restrictions on preferences, see 1624 Bankruptcy Act, §§ 8, 10, *reprinted in* 4 STAT. OF REALM, *supra* note 7, at 1227, 1228-29; 1604 Bankruptcy Act, § 3, *reprinted in* 4 STAT. OF REALM, *supra* at 1031; 1571 Bankruptcy Act, § 11, *reprinted in* 4 STAT. OF REALM, *supra* at 539, 541; 1543 Bankruptcy Act, §§ 3, *reprinted in* 3 STAT. OF REALM, *supra* at 899, 900; see JONES, *supra* note 81, at 31-32 (preferences attacked to stop potential bankrupts from conveying goods for good consideration and yet keep the goods as their own).

For application to nonpossessory secured transactions, see *infra* notes 187-88 and accompanying text. In England courts honored preferences outside of bankruptcy, even if insolvent. See, e.g., *Small v. Oudley*, 2 P. Wms. 427, 24 Eng. Rep. 799 (Ch. 1727) (assignment of leases to secure); *Cock v. Goodfellow*, 10

prohibited undue preferences committed after the act of bankruptcy and the 1571 Bankruptcy Statute insulated good faith conveyances made before the act of bankruptcy. The 1604 Bankruptcy Statute attacked fraudulent conveyances by voiding all conveyances made before the act of bankruptcy unless made for good consideration and value. The 1624 Bankruptcy Statute attacked unlevied judgment liens and collusive judgments forcing these creditors to share ratably and attacked preferences whenever made by providing in the reputed ownership clause that goods in possession of the bankrupt, by consent of the owner, were liable to distribution.¹⁶⁸

Bankruptcy law, however, did not apply to all nonpossessory secured transactions, but only those involving merchant-debtors as provided under the bankruptcy statutes. So a bankruptcy pronouncement on a nonpossessory secured transaction should leave undisturbed priority resolutions under other law between, for example, a secured creditor and a judgment creditor for a nonmerchant-debtor.

1. The Per Se Fraud Rule

The earliest threat to nonpossessory secured transactions under the bankruptcy law came from the reputed ownership clause of the 1624 Bankruptcy Statute:

And for . . . that many psons before they become Bankrupts, doe convey their goods to other Men upon good Consideracion, yet still doe keepe the same, and are reputed the Owners thereof, and dispose the same as their owne; Be it enacted, That if at any tyme hereafter any pson or psons shall become Bankrupt, and . . . shall by the consent and pmission of the true Owner and Pprietarie, have in their Possession Order and Disposicion, any Good or Chattels, whereof they shalbe reputed Owners . . . that in every such Case the said Commissioners . . . shall have power to sell and dispose the same to and for the benefitt of the Creditors¹⁶⁹

Although this language suggests the nonpossessory secured transaction, a sale with retained possession by consent of the secured party owner, lawyers did not apply the clause to void such devices until 1736.¹⁷⁰ The late development occurred because lawyers initially conceived of no different rule from that used under fraudulent conveyance law.¹⁷¹ So the Chancery delivered its first three opinions, all involving ships as collateral, consistent with the absolute-conditional rule, voiding

Mod. 489, 88 Eng. Rep. 822 (Ch. 1718) (deed of South Sea Company stock to secure); *Demainbray v. Metcalfe*, 2 Vern. 691, 23 Eng. Rep. 1048 (Ch. 1715) (payments); *Hopkins v. Grey*, 7 Mod. 139, 87 Eng. Rep. 1149 (K.B. 1704) (payments).

168. See JONES, *supra* note 81, at 8-9, 16, 31.

169. 1624 Bankruptcy Act, § 10, reprinted in 4 STAT. OF REALM, *supra* note 7, at 1227, 1229.

170. See *Bourne v. Dodson*, 1 Atk. 154, 157, 26 Eng. Rep. 100, 101 (Ch. 1740) (nonpossessory secured transaction never thought of as violative of the reputed ownership clause until case of *Stephens v. Sole* in 1736); see also JONES, *supra* note 81, at 32; E. JENKS, A SHORT HISTORY OF ENGLISH LAW 277 n.1 (5th ed. 1938).

171. The late concoction (1736 for a 1624 statute) occurred since the reputed ownership clause also required debtor possession without the true owner's consent and a chattel mortgage before 1750 was believed to provide consent taking the transaction out of the clause. See JOHN JOSEPH POWELL, A TREATISE ON THE LAW OF MORTGAGES 42 (5th ed. 1822); *Copeman v. Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (Ch. 1716) (assignment for benefit of creditors not in bankrupt trustee's estate under reputed ownership clause); *Whitcomb v. Jacob*, 2 Salk. 161, 91 Eng. Rep. 149 (K.B. 1710) (same for merchant goods in hands of bankrupt factor); *L'Apostre v. Le Plaistrier*, 2 Eq. Ca. Abr. 133n, 22 Eng. Rep. 96 (1708) (same for consigned goods).

a security interest in absolute form, upholding one in conditional form, and in dicta suggesting the reputed ownership clause only voids absolute sales.¹⁷²

But in 1749 a Chancery case arose involving multiple false credits on the same collateral. In *Ryall v. Rolle*,¹⁷³ a merchant made multiple conveyances and assignments of his dwelling house, brewhouse, and all coppers and utensils in trade by a mortgage with a redemption. Since some judges showed concern for false credits, presumably some creditors did not know about the secured arrangement of the other creditors. In *Ryall*, the Chancery developed the per se fraud rule to void all nonpossessory secured transactions when challenged under the reputed ownership clause.

The parties argued the case over the applicable rule. The bankruptcy assignees interpreted the reputed ownership clause to void all nonpossessory preferences, especially the nonpossessory secured transaction. It reduced all creditors, other than those who had possession before the act of bankruptcy, such as a judgment lienholder satisfied by execution or a pledgee by delivery, to equality as trusting on the bankrupt personally. The mortgagees argued for application of the absolute-conditional rule. The reputed ownership clause only prohibited those false credits created in absolute form, not those created in conditional form.¹⁷⁴

172. For Chancery's voidance of a nonpossessory secured transaction in absolute form, see *Stevens v. Sole*, unreported, *but described* in *Ryall v. Rolle*, 1 Atk. 165, 170, 26 Eng. Rep. 107, 110, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 352, 27 Eng. Rep. 1074, 1077 (Ch. 1749) (a merchant secured his borrowing with a bill of sale on three River Thames barges with a provision for redemption; the mortgagee later imposed debtor possession); *Brown v. Heathcote*, 1 Atk. 160, 161, 26 Eng. Rep. 103, 104 (Ch. 1746); *Bourne*, 1 Atk. at 157, 26 Eng. Rep. at 101.

For Chancery's affirmation of a nonpossessory secured transaction in conditional form, see *Brown*, 1 Atk. at 160-64, 26 Eng. Rep. at 103-05 (a two-merchant partnership secured a loan with a deed of assignment on cargos of two ships at sea voyaging to Guinea providing for delivery only upon default), 106 (mortgagees did not satisfy the conditions of the reputed ownership clause since a court of equity considers the mortgagor as the owner and not the creditor); *accord* *Atkinson v. Maling*, 2 Term. Rep. 462, 100 Eng. Rep. 249 (K.B. 1788). *But see* *Ryall*, 1 Atk. at 170, 26 Eng. Rep. at 110, 1 Ves. Sen. at 359, 27 Eng. Rep. at 1080 (the *Brown* reasoning does not apply in a court of law, where the mortgagee is considered as the owner).

For the dicta, arising since the parties compromised a settlement, see *Bourne*, 1 Atk. at 154-56, 158, 26 Eng. Rep. 100 (a merchant secured a lending with an indenture of bargain and sale of two ships, personal effects in Virginia and Maryland, and the consigned tobacco subject to a defeasance upon payment of the debt; the time for payment had passed, yet the debtor retained the personalty), 101-02 (most properly applicable to an absolute sale); *see also* *Brown*, 1 Atk. at 161, 26 Eng. Rep. at 104 (confined to absolute sales).

173. 1 Atk. 165, 170, 26 Eng. Rep. 107, 110, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 348-54, 27 Eng. Rep. 1074, 1074-78 (Ch. 1749).

174. The mortgagees also argued (1) the clause voided the chattel mortgages since the common law courts considered the mortgagee as the true owner and (2) an adverse decision would destroy trade on credit because it would permit certain creditors in cases of insolvency to defeat other creditors induced to lend on the basis of apparent ownership of the collateral. *See Ryall*, 1 Ves. Sen. at 354, 27 Eng. Rep. at 1078-79.

The bankrupt assignees would permit exceptions for some chattel mortgages, namely, for ships and cargos at sea provided the parties made arrangement for delivery upon arrival and for bulky goods provided the debtor delivered the warehouse key. *See id.* The mortgagees responded that the proposed exception would destroy trade on credit using business assets since delivery of possession of a shop, key to a warehouse, or possession of a ship would advertise that debtor as a bankrupt. *See id.*, 1 Ves. Sen. at 354-56, 27 Eng. Rep. at 1078-79.

The courts had already recognized two exceptions, one for a foreclosed chattel mortgage, *see* *West v. Skip*, 1 Ves. Sen. 239-40, 243, 27 Eng. Rep. 1006-07 (upholding a security interest in brewery stock converted to a judgment lien against a collusive execution with the debtor's sisters completed before the secured party could levy), 1009 (Ch. 1749) (the transaction did not satisfy the "consent of the owner" requirement of the clause), and one for liens granted by a ship's master for repairs abroad under admiralty law, *see* *Samsun v. Braggington*, 1 Ves. Sen. 443, 27 Eng. Rep. 1132 (Ch. 1750). *But see* *Buxton v. Snee*, 1 Ves. Sen. 154, 27 Eng. Rep. 952 (Ch. 1749) (not for repairs made in England)), and eventually recognized the exception for ships and cargos. *See* *Marton v.*

The Chancellor, Philip Yorke, due to the importance of the situation, sought the assistance of the common law justices on the issue of whether the reputed ownership clause voided these transactions. The consultation resulted in the justices determining that the reputed ownership clause voided these mortgages, but did not agree on a single explanation. The explanations included both the effort to prevent multiple false credits and the effort to void preferences since they destroy the ratable distribution of the bankruptcy statutes. One of these justices noted that the absolute-conditional rule did not even apply for fraudulent conveyance law.¹⁷⁵ The 1571 Fraudulent Conveyance Statute made no such distinction. Instead, under the Fraudulent Conveyance Statute, juries determined the presence of fraud by examining the whole circumstance, the rebuttable rule.¹⁷⁶

The mortgagees represented the views of those who lent to fund the business. They took a nonpossessory security interest in the business assets. The bankrupt assignees represented those who supplied, and bought, from the business's inventory. So the per se fraud rule benefited the small merchants. And Yorke,¹⁷⁷ a zealous Whig, had risen from this class.¹⁷⁸ His brother-in-law was a small merchant.¹⁷⁹ So Yorke became known for adapting the common law to new commercial transactions.¹⁸⁰ Through Yorke much Roman law penetrated into the English common law.¹⁸¹

In 1784 the King's Bench revealed its distaste for preferences and not the multiple lendings. The King's Bench faced a vendor's lien involving a resale to the vendor to create the security interest and a subsequent lease to the buyer-debtor so the debtor had possession with no other mortgages. The court declared that a merchant can not mortgage his goods and keep possession under the reputed ownership clause of the bankruptcy laws.¹⁸²

English courts aimed the per se fraud rule of bankruptcy law established by *Ryall* at some evil. Bankruptcy commissioners would not enforce nonpossessory secured transactions made by debtors who later became bankrupts. The perceived evil did not involve the separation of possession and ownership. Lease transactions and bailment transactions did not violate the clause because the debtor did not originally

Moore, 7 Term. Rep. 67, 101 Eng. Rep. 858 (K.B. 1796) (exception for financing buyer who took security interest in provided supplies held by debtor).

175. See *Ryall*, 1 Ves. Sen. at 359-60, 27 Eng. Rep. at 1081-82.

176. See *Ryall*, 1 Atk. at 173, 180, 183, 26 Eng. Rep. at 112, 117, 118, 1 Ves. Sen. at 364, 368, 372, 27 Eng. Rep. at 1084 (J. Burnet: preferences render bankruptcy useless), 1086 (C.J. Lee: bankruptcy statute intended to end preferences), 1088 (L.C. Hardwicke: statute fosters equal distribution). But see 1 Atk. at 171, 174, 182, 184, 26 Eng. Rep. at 111, 113, 118, 119, 1 Ves. Sen. at 361, 365, 370, 372, 27 Eng. Rep. at 1082 (J. Burnet: citing Hardwicke—statute intended to end false credits), 1084 (B. Parker: intended to end false credits), 1087 (C.J. Lee: same), 1088 (L.C. Hardwicke: same).

177. See 6 CAMPBELL, *supra* note 89, at 158-304 (life of Lord Hardwicke). Philip Yorke (1690-1770) served as Solicitor-General (1720-1723), Attorney-General (1723-1733), Chief Justice of the King's Bench (1733-1737), and as Lord Chancellor (1737-1764) and became Baron Hardwicke in 1733.

178. See *id.* at 158.

179. See *id.* at 159.

180. See *id.* at 183.

181. See 21 GEORGE SMITH, Dictionary of National Biography (1885-1901). The per se fraud rule parroted Roman law's treatment of undisclosed *hypothecas* as fraudulent. See *supra* note 43 and accompanying text.

182. See *Bryson v. Wylie* (K.B. 1784), reported in *Longham v. Biggs*, 1 Bos. & P. 83, 126 Eng. Rep. 790, 791-92 n. (C.P. 1797).

own the personality.¹⁸³ The courts crafted *Ryall* and its progeny at the evil of the debtor's granting a preference, not his multiple lendings. Only the preference defeated the ratable distribution set-up by the bankruptcy laws.

2. The Modified Per se Fraud Rule

The 1604 Bankruptcy Act posed the second, and less serious, threat to nonpossessory secured transactions. That statute defined an act of bankruptcy to include:

mak[ing], or caus[ing] to be made, any fraudulent Graunte, or Conveyance, of his, or their Landes, Tenements, Goods, or Chattels, to the intente, or wherebie his her or their Creditors . . . shall, or may be defeated, or delayed for the Recoverie of their juste and true Debts.¹⁸⁴

A ruling making execution of a nonpossessory secured transaction an act of bankruptcy rendered the date of becoming a bankrupt earlier than otherwise. This voided transactions taking possession of the debtor's assets, such as by a pledge or judgment lien, between that act of bankruptcy and the next, more traditional act of bankruptcy, thereby enlarging the bankrupt's estate for division amongst the creditors. The collateral subject to the transaction also became part of the estate for distribution, but the reputed ownership clause already had that effect.¹⁸⁵

The key to understanding this provision involves two items. First, the debtor's intent required to trigger the provision was not to hinder, delay, or defraud creditors as under the 1571 Fraudulent Conveyance Statute, but to defeat or delay creditors in collecting their ratable apportionment of the bankrupt's assets under the bankruptcy laws. The decision of *Ryall* in 1750 made it clear that fraudulent conveyance rules had no place in bankruptcy law. Second, by its very nature a nonpossessory secured transaction prefers the secured creditor over the other creditors. So creditors pressured prospective bankrupts to grant a nonpossessory security interest in order to avoid the ratable distribution available in a bankruptcy proceeding.

Opinions involving the bankruptcy fraudulent conveyance clause also developed late. Lawyers initially used the absolute-conditional rule under the Fraudulent Conveyance Statute to determine whether a particular nonpossessory secured transaction constituted a fraudulent conveyance. If it did, then the 1604 Bankruptcy Statute also made it an act of bankruptcy permitting a creditor to force a bankruptcy proceeding.

183. For leases, see *Copeman v. Gallant*, 1 P. Wms. 314, 321, 24 Eng. Rep. 404, 406 (Ch. 1716) (trust for creditors of personality not part of trustee-bankrupt's estate).

For bailments, see *ex parte Dumas*, 2 Ves. Sen. 582, 28 Eng. Rep. 372 (Ch. 1754) (negotiable bills not part of bankrupt-factor's estate); *Flyn v. Mathews*, 1 Atk. 185, 187, 26 Eng. Rep. 120, 121 (Ch. 1748) (consignment of tar not part of bankrupt-consignee's estate); *Scott v. Surman*, Willes 400, 125 Eng. Rep. 1235 (C.P. 1742) (goods sent to a bankrupt-factor to sell not part of bankrupt's estate); *Godfrey v. Furzo*, 3 P. Wms. 185, 24 Eng. Rep. 1022 (Ch. 1733) (same); *Whitcomb v. Jacob*, 2 Salk. 160, 91 Eng. Rep. 149 (Ch. 1710) (same).

184. 1604 Bankruptcy Act, § 2, reprinted in 4 STAT. OF REALM, *supra* note 7, at 1031.

185. See *Worseley v. Demattos*, 2 Keny. 218, 236, 96 Eng. Rep. 1160, 1167, 1 Burr. 467, 483, 97 Eng. Rep. 407, 415 (K.B. 1758).

But in mid-eighteenth century, the English courts focused on a different intent, namely, an intention to avoid ratable distribution in bankruptcy. Chancery's first two opinions, involving accounts receivable, required the intent close in time before an additional act of bankruptcy, without mentioning whether the debtor retained possession of the collateral.¹⁸⁶

Then in 1758 the King's Bench extended these principles to implying that intent. In *Worseley v. Demattos*,¹⁸⁷ a financially failing merchant in a refinancing granted a nonpossessory security interest in all his assets to one creditor and, under instructions from the secured creditor, shortly delivered the collateral to the secured creditor and committed a traditional act of bankruptcy. The parties argued the case over the issue of the appropriate rule. To void the delivery of the collateral to the secured party on the eve of the bankruptcy, the bankruptcy assignees contended that the preference, used to avoid a ratable distribution, constituted an act of bankruptcy as a fraudulent conveyance. The secured creditor countered that he had made the refinancing in good faith. It did not violate the absolute-conditional rule. The King's Bench enunciated the modified per se fraud rule. A nonpossessory secured transaction constitutes an act of bankruptcy if the creditor's motive for entering the transaction aims to defeat the ratable distribution of a bankruptcy proceeding. Two conditions, if satisfied, infer that intent: (1) a transaction occurring sufficiently close enough to traditional acts of bankruptcy and (2) the collateral amounting to most of the business assets.¹⁸⁸ The King's Bench confirmed the modified per se fraud rule in two subsequent opinions.¹⁸⁹

186. See *ex parte Gaynor* (Ch. 1755), *unreported but described in* *Worseley v. Demattos*, 2 Keny. 218, 230, 96 Eng. Rep. 1160, 1165, 1 Burr. 467, 477-78, 97 Eng. Rep. 407, 412-13 (K.B. 1758) (voided an assignment of all goods, stock in trade, and book debts except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash to trustees for the benefit of creditors for the purpose of postponing one creditor to the rest by exclusion from the assignment due to the intent); *Unwine v. Oliver* (Ch. 1739), *unreported but described in* *Worseley v. Demattos*, 2 Keny. 218, 222, 96 Eng. Rep. 1160, 1162, 1 Burr. 467, 472, 481, 97 Eng. Rep. 407, 410, 415 (K.B. 1758) (upheld 1739 assignment of some account receivables a month before the would-be additional act of bankruptcy due to the absence of an intent to defeat the bankruptcy laws).

187. 2 Keny. 218, 218-23, 226-29, 238, 96 Eng. Rep. 1160, 1161-62, 1163-65, 1169, 1 Burr. 467, 468-72, 476-77, 483-84, 97 Eng. Rep. 407, 408-10 (debtor, a brewer, corn factor, and miller, transferred by 1755 indenture prepared by lawyers, as security and with a condition defeasance upon payment of all sums spent on buying debtor's outstanding promissory notes and all future advances, all his stock, utensils, and personalty employed in his businesses to the creditor who was to serve as his new banker in London; debtor retained possession of collateral, accepted the creditor's agent as his bookkeeper, and three weeks later, upon recommendation of the bookkeeper, delivered possession of the collateral to the creditor's agent and then committed a traditional act of bankruptcy, refusing to pay another creditor), 412-13, 415-16 (K.B. 1758) (the creditor took delivery on the eve of bankruptcy to avoid the reputed ownership clause and the creditor so intended from the beginning by placing his agent as bookkeeper and the short space of time between execution and the traditional act of bankruptcy).

188. For the proximity element, see *Worseley* at 1 Burr. 483, 97 Eng. Rep. at 415-16 (had the *Ryall* transactions, long before the traditional act of bankruptcy, been proposed as acts of bankruptcy, it would have been disproved).

For the totality element, see *Hooper v. Smith*, 1 Wm. Black. 441, 96 Eng. Rep. 252 (K.B. 1763) (an assignment of a portion of the debtor's stock in a silk business not as security, but without delivery of possession, did not constitute an act of bankruptcy).

189. See *Law v. Skinner*, 2 Wm. Black. 996, 596-97, 96 Eng. Rep. 585, 585-86 (K.B. 1775) (a merchant assigned in 1769 by way of mortgage all his stock in trade, excepting only his household goods of trifling value, and committed the traditional act of bankruptcy in 1771; denied recovery from the bankruptcy assignees for selling the collateral since the nonpossessory secured transaction amounted to an act of bankruptcy since it covered the entire business assets, leaving nothing left in the business to generate income); *Wilson v. Day*, 2 Burr. 827, 827-30, 97 Eng. Rep. 583, 583-85 (K.B. 1760) (a distributor of notes, in poor financial state, secured a creditor through

Again English courts aimed the modified per se fraud rule of bankruptcy law established by *Worseley*, voiding the grant of a nonpossessory secured transaction close in time to another act of bankruptcy and for almost all of the debtor's business assets, at a perceived evil. Similar to the reputed ownership clause, the court directed the modified per se fraud rule at a creditor escaping ratable distribution in bankruptcy.

C. *Post Mid-Eighteenth Century Fraudulent Conveyance Law*

After the American Revolution, English law resolved one issue that later surfaced in the United States as part of the received English law. English courts concluded that bankruptcy law's per se fraud rule did not apply to fraudulent conveyance law.

Once the English courts adopted a per se fraud rule for nonpossessory secured transactions under bankruptcy law, those courts reexamined the nonbankruptcy law. Should the courts continue to use the rule applicable to the Fraudulent Conveyance Statute to determine whether to enforce nonpossessory secured transactions under nonbankruptcy law? Bankruptcy law did not include nonmerchant-debtors and debtors who did not commit an act of bankruptcy. The leading opinions, decided after the American Revolution but accepted by American courts as the pronouncement of the English common law, reannounced the absolute-conditional rule and then reaffirmed the rebuttable rule.

In *Edwards v. Harben*¹⁹⁰ in 1788 the debtor executed an absolute bill of sale on furniture, medicine, and stock in trade for security in 1786 on an old debt. The debtor retained possession, only engaging in symbolic delivery of the goods with a corkscrew. The creditor under earlier negotiations could enter and take the goods after fourteen days to sell. The debtor died on the twelfth day. The creditor took possession on the thirteenth day. A prior creditor sued under his prior debt to recover these goods. The plaintiff-prior creditor argued this transaction constituted a fraudulent conveyance both under the per se fraud rule as established by *Ryall* and the modified per se fraud rule of *Worseley*. The defendant-secured party responded that bankruptcy law rules had no application under fraudulent conveyance law. The King's Bench, on the basis of *Stone*, reaffirmed the absolute-conditional rule: unless the possession accompanied and followed the deed, it was void. So the secured creditor lost since his debtor's possession did not follow the terms of the bill of sale.

The rebuttable rule's application to the nonpossessory secured transaction, however, reappeared in 1800.¹⁹¹ In *Kidd v. Rawlinson*,¹⁹² the debtor's brother-in-law

a 1760 assignment of everything he owned followed two days later by a defeasance document, both prepared by lawyers but not specifying the amount due; the creditor shortly obtained possession of the collateral, the debtor committed a traditional act of bankruptcy, the bankruptcy assignees broke into the creditor's house to take the collateral, and the creditor sued for trespass; the court upheld the defense to the trespass action that the taking of the nonpossessory security interest constituted an act of bankruptcy, so the collateral did not belong to the creditor).

190. 2 Term. Rep. 587, 587-97, 100 Eng. Rep. 315, 315-21 (K.B. 1788).

191. For nonpossessory secured transactions, see *Martindale v. Booth*, 3 B. & Ad. 498, 506, 110 Eng. Rep. 180, 183 (K.B. 1832) (expressly conditional); *Jezeph v. Ingram*, 8 Taunt. 838, 843, 129 Eng. Rep. 609, 611 (C.P. 1817) (expressly conditional); *Benton v. Thornhill*, 7 Taunt. 150, 151, 129 Eng. Rep. 60 (C.P. 1816) (excuse of lived with debtor); *Kidd v. Rawlinson*, 2 Bos. & Pull. 59, 59-60, 126 Eng. Rep. 1155, 1155-56 (K.B. 1800); see also *Steel v. Brown*, 1 Taunt. 381, 127 Eng. Rep. 881 (C.P. 1808) (rejecting the absolute-conditional rule to uphold a nonpossessory secured transaction challenged by a judgment lien).

purchased the debtor's furniture at a sheriff's sale. The debtor remained in possession so he could continue running his public house. Another creditor sent the debtor to debtor's prison to force a bill of sale for the furniture. This creditor sold them. The jury determined that the initial transaction constituted a secured lending by the brother-in-law to the debtor to acquire the furniture. Although the transaction violated the absolute-conditional rule, the court upheld the transaction since the jury found no fraud. The court cited a statement in a treatise by Francis Buller to support the new rebuttable rule when dealing with a nonpossessory secured transaction challenged as a fraudulent conveyance: "but yet the donor continuing in possession is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money."

Another treatise source for the rule comes from John Joseph Powell's work on mortgages. Powell, when discussing chattel mortgages under the 1571 Fraudulent Conveyance Statute, described debtor possession as creating a presumption of fraud. He then set forth three situations rebutting that presumption: (1) substitute delivery, such as permitted under the sales of goods provision of the 1677 Statute of Frauds, suggesting presence of a nonpossessory secured transaction, (2) delivery of title documents when delivery was impossible such as for ships (bill of sale) or goods (bill of lading) at sea, suggesting presence of a nonpossessory secured transaction, and (3) specific words in the contract such as under a conditional bill of sale providing for debtor possession, the old absolute-conditional rule.¹⁹³

For eighteenth century use of the rule, see *Worseley v. Demattos*, 2 Keny. 218, 237, 96 Eng. Rep. 1060, 1167, 1 Burr. 467, 484, 97 Eng. Rep. 407, 416 (K.B. 1758) (bankruptcy case); *Ryall v. Rolle*, 1 Atk. 165, 168-69, 26 Eng. Rep. 107, 109-10, *sub nom.* *Ryall v. Rowles*, 1 Ves. Sen. 348, 359-61, 27 Eng. Rep. 1074, 1081-82 (Ch. 1750) (bankruptcy case); *see also* *Martin v. Podger*, 2 Wm. Black. 701, 702, 96 Eng. Rep. 412, 5 Burr. 2631, 2633, 98 Eng. Rep. 384, 385 (K.B. 1770) (sale); *Hungerford v. Earle*, 1 Eq. Ca. Abr. 148, 21 Eng. Rep. 948, 949, Freem. Ch. 120, 22 Eng. Rep. 1098, 2 Vern. 261, 262, 23 Eng. Rep. 768, 769 (Ch. 1691) (mortgage on realty).

192. 2 Bos. & Pull. 59, 59-60, 126 Eng. Rep. 1155, 1155-56 (K.B. 1800) (citing Buller's *Nisi Prius*); *see* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 258 (1806).

Buller's work first appeared in 1767. *See* 12 HOLDSWORTH, *supra* note 54, at 354. Justice Buller, however, thought his rule equivalent to the absolute-conditional rule. *See* *Edwards v. Harben*, 2 Term. Rep. 587, 100 Eng. Rep. 315 (K.B. 1788) (J. Buller using absolute-conditional rule for a nonpossessory secured transaction); *Haselinton v. Gill*, 3 Term. Rep. 620n, 100 Eng. Rep. 766n (K.B. 1784) (J. Buller using absolute-conditional rule for marriage settlement).

193. *See* POWELL, *supra* note 171, at 21 (presumption), 23 (substitute delivery and inability to deliver), 33 (specified words in the contract). Powell's work first appeared in 1785. *See* 12 HOLDSWORTH, *supra* note 54, at 382.

Parties used the delivery alternative of Powell's rule to justify debtor possession under a nonpossessory secured transaction in several early opinions of the northern United States. *See* *Starr v. Knox*, 2 Conn. 215 (1817) (brig enrolled at New York custom house, debtor continued as master); *Clark v. Richards*, 1 Conn. 54 (1814) (sloop enrolled at New London custom house, debtor continued as master); *Tucker v. Buffington*, 15 Mass. 477 (1819) (ship at sea, sloop in Boston, enrolled at Portland custom house); *Gale v. Ward*, 14 Mass. 352 (1817) (machines too large to take out of factory without disassembly, recorded real estate mortgage); *Jewett v. Warren*, 12 Mass. 300 (1815) (logs on the river behind a boom, secured's agent viewed from hill); *Weller v. Wayland*, 17 Johns. 102 (N.Y. S. Ct. 1819) (1000 cigars for goods, wares, merchandise, and household furniture of a tobacconist); *M'Intyre v. Scott*, 8 Johns. 160 (N.Y. S. Ct. 1811) (brig enrolled at New York custom house); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. S. Ct. 1810) (one spoon for household furniture, goods, and chattels in house of tenant).

Opinions of this sort continue after 1820, with the added situations of symbolic delivery by words, handing over a key, and laying hands on the collateral. *See* *Toby v. Reed*, 9 Conn. 216 (1832) (recorded realty mortgage); *Swift v. Thompson*, 9 Conn. 63 (1831) (recorded realty deed); *Haskell v. Greeley*, 3 Me. 425 (1825) (words at bank for machinery); *Ward v. Sumner*, 22 Mass. 59 (1827) (one piece of household furniture for all); *Homes v. Crane*, 19 Mass. 607 (1824) (secured party laid hands on equipment left with debtor); *Gordon v.*

These two formulations of the rule, by Buller and Powell, meant the nonpossessory secured transaction alone rebutted the presumption of fraud by virtue of debtor possession.

English legal writers also have recognized these pre-nineteenth century rules. Before the Bill of Sale Act of 1854, the English counterpart to the American chattel mortgage acts, English courts voided a bill of sale, the English chattel mortgage, against third parties only if proven fraudulent under the Fraudulent Conveyance Statute or if the chattels had vested in bankruptcy assignees as within the reputed ownership clause.¹⁹⁴ Otherwise the court enforced the nonpossessory secured transaction against third parties.¹⁹⁵

The jury aspect of the rebuttable rule's application to nonpossessory secured transactions lead Parliament to pass the English Bill of Sale Act of 1854 to prevent

Massachusetts Fire & Marine Ins. Co., 19 Mass. 249 (1824) (brig at sea, enrolled at Portland custom house); Parks v. Hall, 19 Mass. 206 (1824) (secured party had key to loft where wine stored); Badlam v. Tucker, 18 Mass. 388 (1823) (brig at sea, enrolled at Boston custom house); Fisher v. Willing, 23 Pa. (8 Serg. & Rawle) 118 (1822) (ship enrolled); Sturgis v. Warren, 11 Verm. 432 (1839) (recorded realty mortgage); Tobias v. Francis, 3 Verm. 423 (1830) (recorded realty mortgage).

194. See E.L.G. TYLER & N.E. PALMER, *CROSSLEY VAINES' PERSONAL PROPERTY* 450 (5th ed. 1973); JOHN HERBERT WILLIAMS & WILLIAM MORSE CROWDY, *GOODERE'S MODERN LAW OF PERSONAL PROPERTY* 100-01 (5th ed. 1912) (same); *supra* note 7 (for the Bill of Sale Act), 116-19 (for the Fraudulent Conveyance Statute) and 169 (for the reputed ownership clause) and accompanying texts.

The majority in value of those creditors who proved debts over ten pounds chose the bankruptcy assignees at their second meeting. See Bankruptcy Act of 1732, 5 Geo. II, ch. 30, §§ 26 & 27, *reprinted* in 16 DANBY PICKERING, *THE STATUTES AT LARGE* 335, 349-50 (1765); The Case of Bankrupts, 2 Co. Rep. 25a, 76 Eng. Rep. 441, 457 (K.B. 1584).

England called their act a Bill of Sales Act since their nonpossessory secured transactions generally involved merchant goods. England lacked realty recording statutes. See *supra* note 7. The English also funded their factories internally, not from loans, since their factories evolved from the putting-out system. See BARBARA TUCKER, *SAMUEL SLATER AND THE ORIGINS OF THE AMERICAN TEXTILE INDUSTRY, 1790-1860* (1984); 6 *THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 276-77 (in the putting-out system, a merchant distributor or supplier hired home workers to process the raw materials for him to distribute the finished product), 297-98 (using accumulated capital to develop the factory by bringing the workers under one roof with machinery) (H.J. Habakkuk & M. Poteon eds., 1965).

Gilmore recognized his historical interpretation failed to explain the later adoption of a chattel mortgage act by the English. See 1 GILMORE, *supra* note 9, at 25-26 (American and English development of security devices differed in the nineteenth century with the United States developing trust receipts, factor's liens, equipment trusts, and bailment leases). The differing financing methods begins this explanation.

The English did have one earlier filing statute for security interests. The Navigation Act of 1695 required registration of mortgages on ships involved in the American trade. In England, the ship registry laws were mandatory for title. See *Young v. Brander*, 8 East 10, 103 Eng. Rep. 248 (K.B. 1806) (under Navigation Act of 1794, 34 Geo. III, ch. 68, § 15, *reprinted* in GREAT BRITAIN, *ACTS OF PARLIAMENT*, 34 GEO. III (1794)). English registry acts commenced with the Navigation Acts of 1660, requiring registration of British-owned foreign ships, of 1695, requiring registration of British-owned, British- and Plantation-built ships engaged in the plantation trade, and of 1786, requiring registration of British-built and -owned ships. See Navigation Act of 1660, 12 Car. II, ch. 18, § 10, *reprinted* in 5 STAT. OF REALM, *supra* note 7, at 246, 248; Navigation Act of 1695-96, 7 & 8 Wm. III, ch. 22, § 16, *reprinted* in 7 STAT. OF REALM, *supra* at 103, 106-07; Navigation Act of 1786, 26 Geo. III, ch. 60, § 3, *reprinted* in GREAT BRITAIN, *ACTS OF PARLIAMENT*, 26 GEO. III 111, 112 (1786); CHARLES, LORD TENTERDEN, *A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN* 76-77 (14th ed. 1901).

195. For secured party victories under the rebuttable rule, see, for example, *Eveleigh v. Purssard*, 2 Mood. & R. 539, 174 Eng. Rep. 374 (Ech. 1844); *Martindale v. Booth*, 3 B. & Ald. 498, 110 Eng. Rep. 180 (K.B. 1832); *Jezeph v. Ingram*, 3 Taunt. 838, 129 Eng. Rep. 609 (C.P. 1817); *Benton v. Thornhill*, 7 Taunt. 156, 129 Eng. Rep. 60 (C.P. 1816); *Steel v. Brown*, 1 Taunt. 381, 127 Eng. Rep. 881 (C.P. 1808); *Kidd v. Rawlinson*, 2 Bos. & Pull. 59, 126 Eng. Rep. 155 (K.B. 1800).

perjuries. Perjury might establish a sham nonpossessory secured transaction or defeat a legitimate one.¹⁹⁶

III. AMERICAN ADOPTION OF THE ENGLISH RULES

The fraudulent theorists assumed one of the four English rules, namely the *per se* fraud rule, automatically applied to English America. This rule did not have general application. It applied only to merchants and then only to protect bankruptcy's ratable distribution.

But knowledge of the English rules for handling nonpossessory secured transactions during the eighteenth century does not convert directly into knowledge of the American pre-chattel mortgage act rules. Although English law had no authority in the American states, it provided a source for American courts to formulate their rules. Since, American colonials borrowed from English merchants, they became well-versed in using nonpossessory secured transactions and the English rules dealing with the transaction.¹⁹⁷ Since the American colonies had their own methods for handling bankruptcies, most did not adopt the *per se* fraud rule the fraudulent theorists claimed.

A. American Reception of the English Common Law

The Crown of England ruled the American colonies during the colonial era but not as part of the Kingdom of England. English law held that if English settlers entered an uninhabited region, they took with them the laws of England; but, if English settlers entered an area by conquest, such as the American colonies, only the Crown had authority to declare what English laws, if any, applied. Parliament alone had no right to legislate for the colonies. Only the Crown could, provided the Crown extended a specific law to the colonies.¹⁹⁸

The Crown in drawing up the colonial charters chose not to extend any English laws to the colonies. Instead the Crown specified that colonial legislators must adopt acts agreeable, and not contrary, to the laws and statutes of England. The Crown also specified that the colonial legislators must treat the colonists as if born in England and not deprive them of their liberties and immunities. Under these charters, many of the seventeenth century colonial legislatures enacted principles from the non-common law courts since they were more familiar with this law.¹⁹⁹

196. See Bills of Sale Act of 1854, 17 & 18 Vict. ch. 36, reprinted in 46 GREAT BRITAIN, THE STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND, 17 & 18 Vict. 140-43 (1854); *Cookson v. Swine*, 9 App. Cas. 653, 664-65 (H.L. 1884) (J. Blackburn); TYLER & PALMER, *supra* note 194, at 450; WILLIAMS & CROWDY, *supra* note 194, at 100-01.

197. See BRAY HAMMOND, BANKS AND POLITICS IN AMERICAN FROM THE REVOLUTION TO THE CIVIL WAR 33 (1957) (colonial merchants generally got 18 months credit from British suppliers, but for domestic transactions they borrowed paper money on mortgage security since they owned land); JONATHAN HUGHES, AMERICAN ECONOMIC HISTORY 53-56, 75 (3rd ed. 1990) (payments balanced for northern merchants and southern planters from English extension of credit). For English rules for the nonpossessory secured transaction, see *supra* notes 111-96 and accompanying text.

198. See, e.g., *Smith v. Brown*, 2 Salk. 666, 91 Eng. Rep. 566 (K.B. n.d.) (Virginia by conquest); *Blankard v. Galdy*, 2 Salk. 411, 91 Eng. Rep. 356 (K.B. 1693) (Jamaica by conquest). See BROWN, *supra* note 87, at 1-3, 12-13.

199. See *id.* at 4, 6-7. For local court laws, see, for example, Julius Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931) (example of county, manorial, and borough

Under these principles the colonies upheld the nonpossessory secured transaction. In 1682 the Connecticut General Court upheld a chattel mortgage, a nonpossessory secured transaction but with possession in a third party, the debtor's agent, on a tannery's inventory and equipment against a levying judgment lien.²⁰⁰ Since the southern colonies adopted their chattel mortgage acts in the eighteenth century before the commencement of their reported opinions, they provide little evidence as to the pre-chattel mortgage act legal rules. For this reason this article generally excludes the southern states formed from the colonies, and their progeny, from this discussion. Yet nineteenth century southern judges recognized enforcement of the nonpossessory secured transaction before passage of their chattel mortgage acts in the eighteenth century.²⁰¹

On the eve of the American Revolution, this remained the English legal position. The common law and the acts of Parliament did not extend to the American colonies.²⁰² The American colonists, however, disagreed. They intermittently claimed the statutory and common law of England applied to them. They still claimed to be Englishmen. First they contended that the charter requirement that their laws agree with the laws of England amounted to an extension of the statutory and common law of England.²⁰³ Later, they contended that the charter concern for "liberties and immunities" conferred an extension of the statutory and common law of England.²⁰⁴ And third they enacted by reference large portions of the English statutes and the common law, most notably South Carolina in 1712 and North Carolina in 1715, whose efforts the Crown did not challenge.²⁰⁵

When colonies rebel, they may decide what law to adopt as their initial laws.²⁰⁶ Consequently, the First Continental Congress claimed that the common law and the English statutes at the time of colonization applied to the colonies.²⁰⁷ They perceived their legal and governmental traditions as English. Although not adopted on a national level, eleven colonies between 1776 and 1784 adopted directly or indirectly some provision for use of the English common law and the English statutes. In November 1785 Thomas Jefferson concluded the colonies had adopted the British system of laws.²⁰⁸ Northern states formed from the colonies included New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania.

court law in the Plymouth Colony).

200. See 3 TRUMBULL, *supra* note 143, at 113. The report gave no explanation for third party possession, however, the debtor, a decedent's estate, had an administrator.

201. See *Hambelton v. Hayward*, 4 Hen. & J. 443, 445 (Md. 1816) (Maryland passed the law of 1729 because courts previously refused to find the nonpossessory secured transaction fraudulent under the Fraudulent Conveyance Statute); *Clayborn v. Hill*, 1 Va. (1 Wash.) 177, 183 (Ch. 1793) ("the law of 1748 [amending the law of 1734] is not creative of the right to mortgage personal property, because it existed at common law . . .").

202. See 1 BLACKSTONE, *supra* note 76, at 107.

203. See BROWN, *supra* note 87, at 12 (example of 1757 Nova Scotia claim for application of English counterfeiting statute).

204. *Id.* at 16 (example of 1803 American edition of Blackstone's COMMENTARIES).

205. See *id.* at 14, 17.

206. See *id.* at 21, at 24 (of the remaining two, Rhode Island did so in 1798 and Connecticut in 1818).

207. See 1 JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789 63, 69 (1904) (Declaration of Rights, Oct. 1774).

208. See 9 PAPERS OF THOMAS JEFFERSON 4, 6 (Julian Boyd ed., 1954) (Jefferson's account of Stanhope Affair, Nov. 1, 1785).

Similarly, when Congress creates new states from territories or other states, the organizational documents may specify the initial laws. Northern states formed from territories or other states included Maine, Vermont, Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, and Iowa.

These sixteen northern states provided for English law in one of six different degrees: (1) continuance of the laws heretofore in force, (2) continuance of the common law and English statutes heretofore in force, (3) continuance of the English common law and any reenacted English statutes, (4) adoption of the common law and the English statutes passed prior to 1607, (5) adoption of the common law, and (6) rejection of English law.

The first group included Massachusetts, New Hampshire, Connecticut, and Maine. Each of these states provided in their first constitution in 1780, 1784, 1818, and 1819, respectively, that the "laws heretofore in force" should continue. The Massachusetts Constitution of 1780, typical of the group, provided:

All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.²⁰⁹

The colonial era dispute over the applicability of the English common law and English statutes made ambiguous what law the constitutional provision meant. Each state's supreme court delivered an opinion, in 1807, 1837, 1823, and 1835, respectively, that it meant the English common law and those English statutes amending or altering the common law at the time of the emigration and some few other English statutes passed since the emigration adopted in the colony.²¹⁰ This law included the 1571 Statute of Fraudulent Conveyances, but excluded the English bankruptcy statutes.²¹¹ The colonial legislatures had passed different bankruptcy acts. The highest courts of Massachusetts and New Hampshire specifically ruled the 1624 Bankruptcy Statute inapplicable in their states.²¹²

209. MASS. CONST. 1780, ch. VI, art. VI; *see* CONN. CONST. 1818, art. 10, § 5 ("All laws not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force until they shall expire by their own limitation, or shall be altered or repealed by the General Assembly. . ."); *see also* MAINE CONST. 1819, art. X, § 1 ("All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature. . ."); N.H. CONST. 1784, art. 90 (virtually identical to Mass.).

210. *See* Card v. Grinman, 5 Conn. 164, 168 (1823), *confirming*, Fitch v. Brainerd, 2 Day 163, 189 (Conn. 1805) (the English common law and the English statutory law relating to it); Cottrell v. Myrick, 12 Me. 222 (1835) (those English laws recognized in Massachusetts as of 1819); Commonwealth v. Knowlton, 2 Mass. 534 (1807); State v. Rollins, 8 N.H. 550, 559-64 (1837) (referring to a statute of April 9, 1777, adopting the English common law).

211. For fraudulent conveyance law, *see*, for example, The Watchman, 29 Fed. Cas. 372, 376, 1 Ware 232 (D. Ct. Me. 1832) (Maine law); Fowler v. Frisbie, 3 Conn. 320, 324 (1820); Goodwin v. Hubbard, 15 Mass. 210, 214 (1818); Everett v. Read, 3 N.H. 55, 55 (1824).

Colonial bankruptcy acts precluded application of English bankruptcy statutes. For Massachusetts, *see*, PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY FOR DEBT, AND BANKRUPTCY 1607-1900 45-50 (1974) (1714, 1757, 1765, 1838). For New Hampshire, *see id.* at 54-55, 63 (1715). For Connecticut, *see id.* at 78-79, 84 (1763, 1853). Maine clearly adopted Massachusetts law. *See* Cottrell v. Myrick, 12 Me. 222 (1835) (those English laws recognized in Massachusetts as of 1819).

212. *See* Putnam v. Dutch, 8 Mass. 287, 289 (1811) (English bankruptcy law does not apply in Mass.); Coburn v. Pickering, 3 N.H. 415, 419 (1826) (the 1624 act does not apply in N.H.).

The second group included Pennsylvania and Rhode Island. These two states provided by statute in 1777 and 1798, respectively, that the common law and the English statutory law should continue. The Pennsylvania statute provided:

[T]he common law and such of the statute laws of England, as have heretofore been in force in the said province, excepted as hereafter excepted [shall be in force and binding]²¹³

The Pennsylvania Supreme Court, and for Rhode Island the Federal Circuit Court, concluded that this language meant the English common law, plus those statutes that the provincial courts had actually applied before the act.²¹⁴ These same courts determined that the language encompassed the Fraudulent Conveyance Statute.²¹⁵ In Rhode Island this law excluded the English bankruptcy statutes since Rhode Island's colonial legislature passed a bankruptcy act.²¹⁶ Pennsylvania, however, waited until after the Revolution before passing a bankruptcy act.²¹⁷ That act applied only to merchants and contained a reputed ownership clause.²¹⁸ But it only remained effective for seven years.²¹⁹ Never-the-less, the Pennsylvania Supreme Court concluded the statutory provision permitted use of the 1624 Bankruptcy Statute opinions.²²⁰

The third group included New York and New Jersey. Each of these states adopted a constitutional provision in 1777 and 1776, respectively, mandating English common law and certain English statutes. The New York Constitution provided:

[S]uch parts of the common law of England and the statute law of England . . . , as together did form the law of said colony on . . . [April 19, 1775] shall be and continue the law of this State subject to alterations . . . as the legislature . . . shall . . . make²²¹

The respective legislatures enacted a law repealing all English statutes in 1786 and 1799, respectively, except as reenacted by the legislature.²²² The reenacted acts

213. 1777 Pa. Laws 1777, ch. 2, § 2, p. 3; *see also* 1798 R.I. Laws 1798 ("[I]n all cases in which provision is not made . . . at common law . . . the statute laws of England, which have heretofore been introduced into practice in this state, shall continue . . ."), *reprinted in* THE FIRST LAWS OF THE STATE OF RHODE ISLAND 75, 78 (John D. Cushing comp., 1983).

214. *See* Steere v. Field, 22 Fed. Cas. 1210, 1224, 2 Mas. 486 (Cir. Ct. R.I. 1822) (Rhode Island law); Morris's Lessee v. Vanderen, 1 Pa. (1 Dallas) 64, 67 (1782).

215. *See, e.g.,* Bean v. Smith, 2 Fed. Cas. 1143, 1150-53, 2 Mas. 252 (Cir. Ct. R.I. 1821) (Rhode Island law); Lessee of Hartley v. M'Anulty, 9 Pa. (4 Yeates) 95 (1804).

216. *See* COLEMAN, *supra* note 211, at 91, 93 (1745, 1756, 1828); *but see* Greene v. Darling, 10 Fed. Cas. 1144, 1148, 4 Mas. 201 (Cir. Ct. R.I. 1828) (R.I. law, 1732 statute set-off similar to R.I. statute).

217. *See* COLEMAN, *supra* note 211, at 151, 153.

218. *See* 1785 Pa. Laws, ch. 230, §§ 1 (merchants) & 20 (reputed ownership clause).

219. *See* 1785 Pa. Laws, ch. 230, § 40.

220. *See* Price v. Ralston, 2 Pa. (2 Dall.) 60, 61-62 (1790) (1624 statute); *see also* Pleasants v. Meng, 1 Pa. (1 Dall.) 380, 390-91 (1788) (1732 statute); Wickersham v. Nicholson, 29 Pa. (14 Serg. & Rawle) 118, 119-20 (1826) (applying the 1604 statute).

221. N.Y. 1777 CONST. art. 35; *see also* N.J. 1776 CONST., § 22 (" . . . the common law of England, as well as so much of the statute law, as have heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the Legislature.").

222. *See* 1786 N.Y. Laws, ch. 35, § 1, p. 247-48; 1799 N.J. Laws, ch. 821, §§ 4-5, p. 608-09.

included the Fraudulent Conveyance Statute.²²³ In both states colonial legislatures had enacted bankruptcy statutes.²²⁴ The highest courts in both the New York and New Jersey ruled the 1624 Bankruptcy Statute inapplicable to fraudulent conveyances in their states.²²⁵

The fourth group included Indiana and Illinois. Although these states' organizational documents left the issue open, they adopted statutes in 1807 and 1812, respectively, adopting the English common law and those related English statutes enacted prior to 1607.²²⁶ This would include the 1571 Fraudulent Conveyance Statute, but not the 1624 Bankruptcy Statute.

The fifth group included Vermont and Michigan, both arriving at this law differently. In 1779 Vermont passed a statute adopting the common law as understood in New England. The legislature expanded this act in 1782 and reenacted in 1787 to include the English common law and English statutes connected with the common law as of October 1, 1760. In 1796 the legislature repealed this act and replaced it with "so much of the common law of England, as is applicable to the local situation and circumstance, and is not repugnant to the constitution."²²⁷ Michigan's organization statute left the issue open.²²⁸ A territorial act of 1810 specifically rejected the acts of the predecessor entities, the Northwest Territory and Territory of Indiana, including acts of the English Parliament.²²⁹ But an opinion of the Michigan Supreme Court in 1828 ruled that this act left the English common law, adopted by Congress in the Northwest Ordinance of 1787.²³⁰

223. See *Magniac v. Thompson*, 16 Fed. Cas. 451, 457, Baldw. 344 (Cir. Ct. Pa. 1831) (New Jersey law); *Beals v. Guernsey*, 8 Johns. 446, 452 (N.Y. 1811).

224. For bankruptcy law of New Jersey, see Peter J. Coleman, *supra* note 211, at 134-35 (1771, 1783). For bankruptcy law of New York, see *id.* at 109, 123-24 (1755, 1784).

225. See *Vanuxen v. Hazelhursts*, 4 N.J.L. 218, 222 (1818) (1542 statute; English bankruptcy statutes never extended to America); *Hall v. Tuttle*, 8 Wend. 375, 381, 388 (1823) (1624 statute inapplicable to N.Y. fraudulent conveyance law); *Craig v. Ward*, 9 Johns. 197, 201 (1812) (same); see also *Dale v. Cooke*, 4 Johns. Ch. 11, 13 (1819) (1732 statute applicable to set-off in our statute); *Duncan v. Lyon*, 3 Johns. Ch. 351, 360 (1818) (same); *Lansing v. Prendergast*, 9 Johns. 127, 128 (1812) (1732 statute applicable to discharge in our 1789 act); *Frost v. Carter*, 1 Johns Cas. 73, 75 (1799) (same).

The United States Bankruptcy Act of 1800 did have a reputed ownership clause for which the courts applied the 1624 statute. See Bankruptcy Act of 1800, § 27, 2 U.S. Stat. 19, 28 (1800); *Sands v. Codwine*, 4 Johns. 536, 563 (1808); see also *Roosevelt v. Mark*, 6 Johns. Ch. 266, 283 (1822) (1732 statute); *Murray v. De Rottenham*, 6 Johns. Ch. 52, 63 (N.Y. 1822) (1705 statute; the 1800 U.S. act consolidated all the English bankruptcy statutes); *Kingston v. Wharton*, 17 Pa. (2 Serg. & Rawle) 208, 216 (1816) (same); *Blythe v. Johns*, 14 Pa. (5 Binn.) 247, 248 (1812) (same); *Ruggan v. West*, 10 Pa. (1 Binn.) 263, 269 (1808) (same).

226. See 1807 Ind. Terr. Laws, ch. 24, p. 139 ("The Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to the fourth year of the reign of King James the first . . . shall be considered, as of full force."); 1812 Ill. Terr. Laws, p. 5 ("all the laws passed by the Legislature of the Indiana Territory which were in force on [3-1-1809] . . . shall . . . remain until altered or repealed . . .").

227. See 1796 Verm. Laws, p. 4; 1787 Verm. Laws, p. 30; 1782 Verm. Laws, p. 101-02; 1779 Verm. Laws, p. 36-37.

228. See Act Dividing Indiana Territory, 2 U.S. Stat. 309, § 5 (1805) (providing Indiana Territorial law for Michigan Territory only for pending lawsuits).

229. See 1810 Mich. Terr. Laws (Cass Code of 1816), reprinted in 1 W.S. GEORGE & CO., LAWS OF THE TERRITORY OF MICHIGAN 210, 900-02 (1871) (1821).

230. See *Chene v. Compau* (Mich. 1828); 1 TRANSACTIONS IN THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1825-36 82 (William Wirt Blume ed., 1940); Northwest Territory Act, 1 U.S. Stat. 51 (1787) ("benefits . . . of judicial proceedings according to the course of the common law.").

Many learned jurists regarded the 1571 Fraudulent Conveyance Statute as merely declarative or in affirmance of the pre-existing English common law.²³¹

The sixth group included Ohio, Wisconsin, Iowa, and Minnesota. The organic act of each continued the predecessor entity's law. For Ohio, the continued law was the 1795 Act of the Northwest Territory adopting the English common law and English statutes enacted before 1607.²³² For Wisconsin, it was the 1828 Michigan opinion adopting the English common law.²³³ For Iowa and Minnesota it was the law of Wisconsin.²³⁴ Ohio, Wisconsin, and Iowa each passed a statute repealing that law in 1806, 1839, and 1840, respectively.²³⁵ So Minnesota continued the Wisconsin repealer. Never-the-less, Ohio still followed the 1571 Fraudulent Conveyance Statute.²³⁶

B. The Four American Rules

So in the northern states, the 1571 Fraudulent Conveyance Statute, but not the Bankruptcy Statutes, were effective for Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, New Jersey, Indiana, Illinois, and Ohio. One could expect them to adopt the absolute-conditional rule or the rebuttable rule depending on whether they had adopted the sale of goods provision of the 1677 Statute of Frauds. Maine, Massachusetts, New Hampshire, New York, New Jersey, and Ohio adopted the rebuttable rule,²³⁷ Connecticut eventually adopted the heightened rebuttable rule,²³⁸ and Indiana and Illinois adopted the absolute-conditional rule.²³⁹ Rhode Island had no pre-chattel mortgage act opinions. Vermont and Michigan had adopted only the English common law. To the extent that

231. See, e.g., 4 KENT, *supra* note 68, at 463. But see *supra* note 32 for the contrary view.

232. See OHIO 1802 CONST., § 4 ("Laws and part of laws now in force in this Territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed . . ."); LAWS OF THE NORTHWEST TERRITORY, 1788-1800 (Theodore Calvin Pease ed., 1925), 253 ("The common law of England, all statutes or acts of the British Parliament made in aid of the common law, prior to the fourth year of the reign of King James the first . . . shall be the rule of decision . . .").

233. See Wisconsin Territorial Act, § 12, 5 U.S. Stat. 10, 15 (1836) ("The existing laws of the Territory of Michigan shall be extended over the said Territory so far as the same shall not be incompatible with the provisions of this act, subject nevertheless, to be . . . repealed.").

234. For Iowa, see Iowa Territorial Act, § 12, 5 U.S. Stat. 235, 239 (1838) (continuing the laws of Wisconsin).

For Minnesota, see Minnesota Territorial Act, § 12, 9 U.S. Stat. 403, 407 (1849) ("the laws in force in the Territory of Wisconsin at the date of admission of the State of Wisconsin [i.e. 1848] shall continue").

235. See 1840 Iowa Terr. Laws, ch. 29, p. 20; 1805 Ohio Laws 1806, p. 38 (Jan. 2, 1806); 1839 Wisc. Laws, p. 404-07.

236. See *Burgett's Lessee v. Burgett*, 1 Ohio 469, 473 (1824).

237. See *Haskell v. Greeley*, 3 Me. 425 (1825); *Hussey v. Thornton*, 4 Mass. 404 (1808); *Haven v. Low*, 2 N.H. 13 (1819); *Hendricks v. Mount*, 5 N.J. Law 850 (1820); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. S. Ct. 1810); *Rogers v. Dare*, Wright 137 (Ohio Cty. Ct. 1832).

Ohio had not adopted the sale of goods provision. See 1810 Ohio Laws, reprinted in Ohio, ACTS OF A GENERAL NATURE, ENACTED, REVISED AND ORDERED TO BE PRINTED AT THE FIRST SESSION OF THE TWENTY-NINTH GENERAL ASSEMBLY OF THE STATE OF OHIO 218 (1831); 3 REED, *supra* note 139, at 325-26, and so perhaps should have adopted the absolute-conditional rule.

238. See *Patten v. Smith*, 5 Conn. 196 (1824). The heightened rebuttable rule required more than just the nonpossessory secured transaction to rebut the presumption of fraud from the debtor's possession of the collateral.

239. See *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833); *Thornton v. Davenport*, 2 Ill. 295 (1836).

Indiana had adopted the sale of goods provision, see 1830 Ind. Laws, ch. 41, § 21, p. 269, 274 (\$30.00), and so perhaps should have adopted the rebuttable rule. Illinois did not adopt the sale of goods provision. See 1833 Ill. Rev. Code, p. 313; 1827 Ill. Rev. Code, p. 230; 3 REED, *supra* note 139, at 293-94.

common law included the 1571 Fraudulent Conveyance Statute, they also might adopt one of these two rules. Michigan adopted the rebuttable rule, and Vermont eventually the heightened rebuttable rule.²⁴⁰ Pennsylvania had adopted both the Fraudulent Conveyance Statute and the reputed ownership clause from the 1624 Bankruptcy Statute but not the sale of goods provision of the 1677 Statute of Frauds.²⁴¹ So Pennsylvania courts would have a choice of the absolute-conditional rule and the per se fraud rule. Pennsylvania started with the absolute-conditional rule, but eventually settled on the per se fraud rule, the only state to conform eventually to the fraudulent theorists' view.²⁴² Wisconsin, Iowa, and Minnesota, having adopted no English law, could adopt any rule from any source.²⁴³ But these three states had no pre-chattel mortgage act opinions.

Opinions from these northern states upholding the nonpossessory secured transaction when challenged by a third party numbered seventy-six out of one hundred seven opinions.²⁴⁴ So appellate judges in the northern United States

240. See *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845); *Tobias v. Francis*, 3 Verm. 423 (1830).

Michigan had adopted the sale of goods provision. See 1819 Mich. Laws, reprinted in 1 Michigan, LAWS OF THE TERRITORY OF MICHIGAN 461, 468 (1871) (\$25.00).

241. See CAINES, *supra* note 134, at 376.

242. See *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819) (per se fraud rule); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (absolute-conditional rule).

243. Wisconsin and Minnesota adopted the sale of goods provision, but not Iowa. See 3 REED, *supra* note 139, at 297-98 (Iowa), 311 (Minnesota), & 340-41 (Wisconsin).

244. For actions involving judgment lien creditors, see *D'Wolf v. Harris*, 29 U.S. (4 Pet.) 147 (1830) (won); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828) (New York law) (won); *Toby v. Reed*, 9 Conn. 216 (1832) (lost); *Patten v. Smith*, 5 Conn. 196 (1824) (lost); *Rhines v. Phelps*, 8 Ill. 455 (1846) (lost); *Letcher v. Norton*, 5 Ill. 575 (1843) (won). For unidentified actions involving judgment lien creditors, see *Thornton v. Davenport*, 2 Ill. 295 (1836) (won); *Kitchell v. Bratton*, 2 Ill. 300 (1836) (won); *Hankins v. Ingols*, 4 Blackf. 34 (Ind. 1834) (won); *Watson v. Williams*, 4 Blackf. 26 (Ind. 1835) (won); *Jordan v. Turner*, 3 Blackf. 309 (Ind. 1833) (lost); *Abbott v. Goodwin*, 20 Me. 409 (1841) (won); *Smith v. Putney*, 18 Me. 87 (1841) (won); *Cutter v. Copeland*, 18 Me. 127 (1841) (won); *Ingraham v. Martin*, 15 Me. 373 (1839) (won); *Melody v. Chandler*, 12 Me. 282 (1835) (won); *Gleason v. Drew*, 9 Me. 79 (1832) (won); *Holbrook v. Baker*, 5 Me. 309 (1826) (won); *Reed v. Jewett*, 5 Me. 96 (1827) (won); *Bartels v. Harris*, 4 Me. 146 (1826) (won); *Ulmer v. Hills*, 5 Me. 326 (1832) (won); *Brinley v. Spring*, 7 Me. 241 (1831) (won); *Haskell v. Greeley*, 3 Me. 425 (1825) (won); *Fletcher v. Willard*, 31 Mass. 464 (1833) (won); *Macomber v. Parker*, 31 Mass. 497 (1833) (won); *Merrill v. Hunnewell*, 30 Mass. 213 (1832) (lost); *Hunt v. Halton*, 30 Mass. 216 (1832) (won); *Summer v. Hamlet*, 29 Mass. 76 (1831) (won); *Johns v. Church*, 29 Mass. 557 (1832) (won); *Adams v. Wheeler*, 27 Mass. 199 (1830) (won); *Reed v. Upton*, 27 Mass. 522 (1830) (won); *Carrington v. Smith*, 25 Mass. 419 (1829) (won); *Shumway v. Rutter*, 24 Mass. 56 (1828) (lost); *Ayer v. Bartlett*, 23 Mass. 71 (1827) (won); *Butterfield v. Baker*, 22 Mass. 526 (1827) (lost); *Ward v. Sumner*, 22 Mass. 59 (1827) (won); *Parks v. Hall*, 19 Mass. 206 (1824) (won); *Homes v. Crane*, 19 Mass. 607 (1824) (won); *Bartlett v. Williams*, 18 Mass. 288 (1823) (won); *Badlam v. Tucker*, 18 Mass. 388 (1822) (won); *Lanfear v. Sumner*, 17 Mass. 110 (1821) (lost); *Rice v. Austin*, 17 Mass. 197 (1821) (won); *Marston v. Baldwin*, 17 Mass. 606 (1822) (won); *Putnam v. Dutch*, 8 Mass. 287 (1811) (won); *Portland Bank v. Stubbs*, 6 Mass. 423 (1810) (won); *Portland Bank v. Stacey*, 4 Mass. 661 (1808) (won); *Hussey v. Thornton*, 4 Mass. 404 (1808) (won); *Jackson v. Dean*, 1 Doug. 519 (Mich. 1845) (won); *Ash v. Savage*, 5 N.H. 545 (1831) (won); *Haven v. Low*, 2 N.H. 13 (1819) (won); *Hall v. Snowhill*, 14 N.J. Law 8 (1833) (won); *Randal v. Cook*, 17 Wend. 54 (N.Y. S. Ct. 1837) (lost); *Doane v. Eddy*, 16 Wend. 523 (N.Y. S. Ct. 1837) (lost); *Look v. Comstock*, 15 Wend. 244 (N.Y. S. Ct. 1836) (lost); *Patchin v. Pierce*, 12 Wend. 61 (N.Y. S. Ct. 1834) (won); *Gardner v. Adams*, 12 Wend. 297 (N.Y. S. Ct. 1834) (lost); *Ferguson v. Lee*, 9 Wend. 258 (N.Y. S. Ct. 1832) (lost); *Langdon v. Buell*, 9 Wend. 80 (N.Y. S. Ct. 1832) (lost); *Hall v. Tuttle*, 8 Wend. 375 (N.Y. S. Ct. 1832) (won); *Bailey v. Burton*, 8 Wend. 338 (N.Y. S. Ct. 1831) (lost); *McLachland v. Wright*, 3 Wend. 348 (N.Y. S. Ct. 1829) (lost); *Divver v. McLaughlin*, 2 Wend. 596 (N.Y. S. Ct. 1829) (lost); *Stutson v. Brown*, 7 Cow. 731 (N.Y. S. Ct. 1827) (lost); *Reynolds v. Shuler*, 5 Cow. 323 (N.Y. S. Ct. 1826) (won); *Bissell v. Hopkins*, 3 Cow. 166 (N.Y. S. Ct. 1824) (won); *Ludlow v. Hurd*, 19 Johns. 102 (N.Y. S. Ct. 1821) (won); *Weller v. Wayland*, 2 Johns. Ch. 283 (N.Y. 1817) (won); *Hendricks v. Robinson*, 2 Johns. Ch. 283 (N.Y. 1817) (won); *Collins v. Myers*, 16 Ohio 547 (1847) (lost); *Kellog v. Brennan*, 14 Ohio 72 (1846) (lost); *Clark v. Jack*, 47 Pa. (7 Watts) 375 (1838) (won); *Jenkins v. Eichelberger*, 44 Pa. (4 Watts) 121 (1835) (won);

provided numerous examples of nonpossessory secured transactions enforced against third parties in the forty years before the adoption of their respective chattel mortgage acts, from 1791 to 1832.

The nineteenth century American legal writers did not concur in the fraudulent conveyance theory.²⁴⁵ They discerned a pre-chattel mortgage act rule to handle the nonpossessory secured transaction when challenged by third parties. For them different courts and the same courts at different times had held widely different doctrines, sometimes treating the nonpossessory secured transaction as absolutely void as a fraudulent conveyance, sometimes as *prima facie* void but rebuttable, and sometimes valid until impeached by other evidence of fraud.²⁴⁶ The nineteenth century record clearly did not support the sudden appearance of the nonpossessory secured transaction after the adoption of the chattel mortgage acts.

IV. CONCLUSION

When Glanville first recorded the English common law, Anglo-American secured transaction law confronted the tension between the rules used by Roman law permitting the nonpossessory secured transaction and by Germanic law banning the transaction. Controlled by Normans, England opted for the Germanic ban.

Although developing the forms necessary for the nonpossessory secured transaction by 1500, the conditional sale and conditional deed, the ban persisted as long as the statutes favored alternative security devices, namely the pledge and the collusive judgment, the major competing security device. But the allowance of interest after 1571 obviated the advantage of the pledge to surreptitiously generate

Myers v. Harvey, 39 Pa. (2 Pen. & W.) 478 (1831) (won); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826) (lost); *Clow v. Woods*, 20 Pa. (5 Serg. & Rawle) 275 (1819) (lost); *Morgan's Executors v. Biddle*, 6 Pa. (1 Yeates) 3 (1791) (won); *Sturgis v. Warren*, 11 Verm. 432 (1839) (lost); *Woodward v. Gates*, 9 Verm. 358 (1837) (lost); *Tobias v. Francis*, 3 Verm. 423 (1830) (lost); *Spaulding v. Austin*, 2 Verm. 555 (1829) (won).

For actions dealing with purchasers, see *Morris v. Grover*, 3 Ill. 528 (1840) (lost); *Pritchard v. Low*, 15 Me. 48 (1838) (won); *Lane v. Borland*, 14 Me. 77 (1836) (won); *Tibbets v. Towle*, 12 Me. 341 (1835) (won); *Lunt v. Whitaker*, 10 Me. 310 (1833) (won); *Sawyer v. Shaw*, 9 Me. 47 (1832) (won); *Murray v. Burtis*, 15 Wend. 212 (N.Y. S. Ct. 1836) (won); *Ferguson v. Union Furnace Co.*, 9 Wend. 345 (N.Y. S. Ct. 1832) (won); *Lewis v. Stevenson*, 2 Hall 63 (N.Y. Sup. Ct. 1829) (won); *Barrow v. Paxton*, 5 Johns. 258 (N.Y. S. Ct. 1810) (won); *Hooban v. Bidwell*, 16 Ohio 509 (1847) (won); *Hornbeck v. Vanmetre*, 9 Ohio 153 (1839) (won).

For actions concerning general creditors, see *Swift v. Thompson*, 9 Conn. 63 (1831) (lost); *Starr v. Knox*, 2 Conn. 215 (1817) (book debt: lost); *Clark v. Richards*, 1 Conn. 54 (1814) (case: lost); *Witwell v. Vincent*, 21 Mass. 452 (1825) (assumpsit: won); *Northeast Marine Ins. Co. v. Chandler*, 16 Mass. 274 (1820) (won); *Jewett v. Warren*, 12 Mass. 300 (1815) (won); *Peters v. Ballister*, 20 Mass. 475 (1825) (won); *Hendricks v. Mount*, 5 N.J. Law 850 (1820) (case: won); *Welsh v. Bekey*, 38 Pa. (1 Pen. & W.) 57 (1829) (lost); *Passmore v. Eldridge*, 27 Pa. (12 Serg. & Rawle) 198 (1824) (won); *Fletcher v. Howard*, 2 Verm. 115 (1826) (won).

For actions treating another secured party, see *The Mary*, 16 F. Cas. 938, 1 Wash. C.C. 226 (C.C.D. Conn. 1824) (Connecticut law) (lost); *Barrett v. Pritchard*, 19 Mass. 512 (1824) (won); *Levy v. Welsh*, 2 Edw. Ch. 438 (N.Y. 1835) (foreclosure: won); *Rogers v. Dare*, *Wright* 137 (Ohio Cty. Ct. 1832) (won).

245. See 2 FRANCIS HILLIARD, *THE LAW OF MORTGAGES OF REAL AND PERSONAL PROPERTY* 401 (1864); JONES, *supra* note 62, at 262-63 (citing the absolute-conditional rule used by the English and describing the absolute portion as a *per se* fraud rule). See *supra* notes 120-36 and accompanying text for the absolute-conditional rule.

246. See 2 HILLIARD, *supra* note 245, at 401; JONES, *supra* note 62, at 262-63 (citing the absolute-conditional rule and describing the absolute portion as a *per se* fraud rule); ABNER THOMAS, *CHATTEL MORTGAGES AND CONDITIONAL SALES: A TREATISE ON THE LAW OF MORTGAGES AND CONDITIONAL SALES OF PERSONAL PROPERTY IN THE STATE OF NEW YORK* 158-59 (1889) (citing the absolute-conditional rule and the rebuttable rule). See *supra* notes 117-59 & 169-83 and accompanying text for the rebuttable and *per se* fraud rules.

interest under the usury ban. And the 1677 Statute of Frauds destroyed the priority of the collusive judgment by dating its priority from the time the creditors delivered the writ of execution to the sheriff for execution, rather than the date of entry of the execution writ, shortly after the entry of the judgment and before the lending. Soon thereafter the nonpossessory secured transaction appeared in both England and America. Only the absence of a speedy levy mechanism, enjoyed by the collusive judgment, held back the full development of the nonpossessory secured transaction.

During the eighteenth century, the Anglo-American nonpossessory secured transaction when challenged by third parties, predominantly judgment creditors, faced threats from the 1571 Fraudulent Conveyance Statute and the reputed ownership clause of the 1624 Bankruptcy Statute. The courts generally upheld the transaction under the absolute-conditional rule designed to benefit the landed aristocrats, and later the rebuttable rule devised by the newly emergent merchant aristocrats to allow oral transactions in compliance with the sale of goods provision of the 1677 Statute of Frauds, both in England and the United States when challenged under the 1571 Fraudulent Conveyance Statute. Courts intended both the absolute-conditional rule and the rebuttable rule to uphold honest transactions against adversely affected third parties. Only where the reputed ownership clause applied, for English merchants in bankruptcy proceedings and later for Pennsylvanian merchants, did the courts strike down the nonpossessory secured transaction as fraudulent. Courts generally intended the *per se* fraud rule to protect bankruptcy's ratable distribution.

By focusing on the few Pennsylvanian cases applying the *per se* fraud rule in the United States, and then only after 1819,²⁴⁷ the fraudulent theorists have cut off any attempt to understand the *raison d'être* for the transaction, thereby complicating their subsequent efforts to justify the transaction. The transaction long served a useful function to compel compliance with promises after the collapse of the collusive judgment in 1677 until made fraudulent by the chattel mortgage acts against third parties, unless filed, in order to force their public registration.

247. See BAIRD & JACKSON, *supra* note 8, at 8. Two later Pennsylvanian opinions followed *Clow*. See *Welsh v. Bekey*, 38 Pa. (1 Pen. & W.) 57 (1829); *Martin v. Mathiot*, 29 Pa. (14 Serg. & Rawle) 214 (1826).